THE
INCOME TAX REPORTS

A JOURNAL OF THE LAW OF INCOME TAX

WITH

REPORTS OF

INDIAN AND SELECT ENGLISH CASES

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1. Affirmed.

2. Applied.

3. Approved.

4. Dissented from.

5. Distinguished

INCOME TAX REPORTS.

Vol. III, 1935.

INDEX TO NOTES AND COMMENTS.

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NOTES AND COMMENTS.

Progress of the Law of Income Tax During the Year 1934.

Before we proceed to consider the decisions of the new year we shall pause for a moment and briefly review the progress of the law of income tax in India in the year that has gone by.

Where land is mortgaged and the mortgagee is authorised to appropriate the income of the property towards the interest on the loan, the question arises whether the income thus received by the mortgagee is AGRICULTURAL INCOME. This question was answered in the affirmative in *Commissioner of Income Tax, Bihar and Orissa* v. *Sir Kameshwar Singh* [1934 I. T. R. 107]. The learned Chief Justice observed in this case that the source of the income must be considered in its proximate rather than its ultimate significance and that the income tax authorities are not concerned with the intention of the assessee in making the investment. In a later case it was contended before the Madras High Court that this rule cannot be applied where a particular rate of interest is specified for the mortgage debt. This contention was also negatived by a Full Bench of the Madras High Court in *Hajee Mahomed Sadak Koyee Sahib's Case* decided on December 13, 1934.

The true principle relating to the assessment of ANNUITIES, with regard to which there is no express provision in the Indian Income Tax Act, are discussed and stated by the Patna High Court in the *Tikari Raj Case* [1934 I. T. R. 264]. This decision establishes that annuities are assessable under the Indian Act if they are really income and that the crucial question to be determined before deciding whether an annuity is taxable is whether it is really income or a receipt of capital in annual instalments. As the learned Chief Justice has pointed out in this case, an owner of capital may exchange it for an income which is taxable or for another form of capital which is not taxable and

the question whether what is obtained in exchange is taxable depends on the nature of the transaction in the particular case.

On the question of BAD DEBTS the Judicial Committee have laid down in *Commissioner of Income Tax, Bombay* v. *F. E. Dinshaw* [1934 I. T. R. 319], reversing the decision of the Bombay High Court, that there is no principle or authority to support the view that to constitute moneys due by a limited company a bad debt the company should have ceased to be a going concern. Whether a debt is wholly or partly, and to what extent bad is in every case—whether the debtor is a human being or a joint stock company or other entity—a question of fact to be decided by the appropriate tribunal upon a consideration of the relevant facts of the case. In *Bansidar Podda* v. *Commissioner of Income Tax, Bihar and Orissa* [1934 I. T. R. 20] the Patna High Court has approved the practice of income tax authorities to regard a debt as bad *prima facie* where it is barred by limitation and is no longer recoverable. Though the question whether a debt has become bad and when it became bad are questions to be decided on the facts of each case and though a statute barred debt is not necessarily bad, as observed by the Judicial Committee in the case of *Sir M. Chitnavis* [59 I. A. 290], yet it is not unreasonable to presume when a debt has become time-barred, that it has become bad. The decision of the Lahore High Court in *Rulia Mal Raunak Ram* v. *Commissioner of Income Tax, Punjab* [1934 I. T. R. 329] in which it was held that the decision of the income tax officer on the question whether a debt is bad or recoverable operates only for the particular year of assessment and that it would be open to the assessee to repeat his claim in any subsequent year may also be noted in this connection.

Coming to BEST JUDGMENT ASSESSMENT, the Allahabad High Court has explained in *Jot Ram Sher Singh* v. *Commissioner of Income Tax, U. P.* [1934 I. T. R. 129] the true nature of such assessment. Their Lordships have rightly pointed out that it should be borne in mind that an assessment under Section 23 (4) should not be influenced by a desire to punish the assessee for non-compliance with a notice under Section 22 or Section 23, however culpable such non-compliance may be. An assessment under Section 23 (4) must be one made to the best judgment of the Income Tax Officer. To punish the assessee by a so-called best judgment assessment is wholly unwarranted. In the above-mentioned case on the question whether a reference

to the High Court lies from a best judgment assessment the Allahabad High Court has followed *Abdul Bari's Case* [9 Rang. 281] in preference to the Patna view as expressed in *Ananda's Case* [11 Pat. 181] and answered the question in the negative. The Sind Judicial Commissioner's Court has, however, held in *Khemchand Ramdas* v. *Commissioner of Income Tax, Bombay* [1934 I.T.R. 216] that an appeal would lie from a best judgment assessment when the ground of appeal is that the assessee ought to have been assessed in a different capacity. In a lengthy judgment in *Laxminarain's Case* [1934 I.T.R. 246] the Nagpur Judicial Commissioner's Court have laid down certain rules to be followed by income tax authorities in making a best judgment assessment, *viz.*, that the authorities should make a local enquiry, should place on record a note of the details and results of such enquiry and so on. We have already expressed our doubts as to whether there is any justification in law for laying down such rules. [*Vide* 1934 Inc. Tax Rep: Notes and Comments, p. 37.]

The distinction between CAPITAL LOSS AND LOSS IN BUSINESS is illustrated in *Ganga Sagar, In re,* [1932 I.T.R. 155] where a claim for deduction of loss which the assessee had incurred in respect of shares which he had to sell at a loss was not allowed, as he did not carry on any business in the purchase and sale of shares, but had only invested his capital in shares. Loss of collections from the shop through dacoity was held to be capital loss by the Lahore High Court in *L. N. Gadodia, In re,* [1934 I.T.R. 322]. Loss incurred by a solvent partner who had to bear his ex-partner's share of the loss in the partnership business was held to be capital loss in *Rm. Ar. Rm. Arunachalam Chettiar's Case* [1934 I.T.R. 401], and the Madras High Court has also held recently in *The South Indian Industrials, Ltd., In re,* that where one of the businesses carried on by the assessee is closed down loss incurred in respect of that business cannot be set off against the income of the other businesses.

Instances of CASUAL AND NON-RECURRING RECEIPTS not arising from business are to be found in *Johnstone, In re,* [1934 I.T.R. 390] and *Commissioner of Income Tax, Burma* v. *J. I. Milne* [1934 I.T.R. 25]. In the former case gratuity paid to the servant of a company which went into liquidation by a person who was interested in that company, from charitable motives, was held exempt from tax. In the latter, money received by the assessee under a promise made to him by his debtor when the assessee

advanced a loan, to pay a portion of the price of the debtor's property in the event of its sale, was held to be a casual and non-recurring receipt.

A judgment of considerable importance to CO-OPERATIVE SOCIETIES was pronounced by the Rangoon High Court in the *Bengalee Urban Co-operative Credit Society Ltd., In re*, [1934 I. T. R. 121]. It has been laid down in this case that the word 'profits' is used in the notification of the Government which exempts the profits of co-operative societies from income tax, in the sense of the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts and that *prima facie* therefore, neither interest from securities nor income derived from property are profits within the meaning of that term as used in the notification. The effect of this decision is that unless investment of capital in securities or house property forms part of the business of the society, income from interest on securities or house property cannot be deemed profits and is not exempt from tax.

ENGLISH COMPANIES may note the decision of the House of Lords in *Assam Railways and Trading Co., Ltd.* v. *Commissioners of Inland Revenue*, [1934 I.T.R. 467] affirming the judgment of the Court of Appeal. The Indian Law allows certain deductions which are not allowed in England and the House of Lords have finally stated the correct principle on which relief would be granted in the United Kingdom against double taxation where income which has been taxed in India is sought to be taxed in the United Kingdom. The recent amendment of Section 49 of the Indian Income Tax Act which was necessitated by the recent increases in the Indian rate of income tax and the reduction in the British rates, may also be referred to here. The object of the amendment is to provide that when income doubly taxed has obtained relief in the United Kingdom, the balance of relief obtainable in British India shall not exceed the difference between the rate at which relief was obtained and the rate at which tax was paid in that country in which the rate of tax was lower.

On the question whether DEPRECIATION OF MACHINERY should be based on the original cost to the assessee or to his predecessor, when there has been a transsfer of the machinery, on which there is so much conflict of opinion, the Madras High Court has in *Buckingham and Carnatic Mills Ltd., In re*, re-affirmed its view in *Massey's Case*, though this view has not been accepted in Bombay and Patna

and to some extent in Burma also. The question is now pending before the Judicial Committee for decision.

With regard to assessment of HINDU UNDIVIDED FAMILIES it has been held in *Nathu Sao* v. *Commissioner of Income Tax, U.P. & C.P.* [1934 I.T.R. 463] that a Hindu family is still an 'undivided family' for the purposes of income tax even though there is only a single male member, provided there are also widows of deceased co-parceners living jointly with him.

On the question whether Section 25-A of the Income Tax Act which provides for assessment after partition, contemplates a partition by metes and bounds or a mere disruption of the joint status it was decided by the Lahore High Court in *Saligram Ramlal's Case* [1934 I.T.R. 440] that the section requires a partition by metes and bounds, but in a later Full Bench case *Sher Singh Nathuram's Case* [1934 I.T.R. 479] the very same Court has taken a different view and held that Section 25-A only contemplates a disruption of status with ascertainment of the shares of the members. In *Biradhmal Lodha's Case* [1934 I.T.R. 164] it was held that a partial division of joint family property is, in any case, not sufficient for applying Section 25-A.

The view that amounts received by junior member of IMPARTIBLE ESTATES for their maintenance from the holder for the time being are received by them as members of a Hindu undivided family has been affirmed in two cases, *Maharaja Kumar of Vizianagaram, In re,* [1934 I.T.R. 186] and *Commissioner of Income Tax, Madras* v. *Narayana Gajapathi Raju,* [1934 I.T.R. 288].

In *The Bharat Insurance Co.* v. *Commissioner of Income Tax, Punjab* [1934 I.T.R. 63] the Judicial Committee have affirmed the decision of the Lahore High Court that profits allotted to participating policyholders of an INSURANCE COMPANY are profits of the company and not expenditure incurred for earning profits, and are assessable to income-tax.

As to LEASES, the decision of the Madras High Court in the *Madras Cricket Club, In re,* [1934 I.T.R. 209] establishes that when a lessee erects a building and is entitled to remove it on the termination of the lease, he is liable to be assessed as 'owner' on the annual value of the building, and *Katras Encumbered Estate's Case* [1934 I.T.R. 100] shows that royalty payable to the lessor which is appropriated by the lessee under the terms of the lease for reducing the amount of the loan advanced by the lessee is income of the lessor.

(*To be continued.*)

Legal Adviser to the Commissioner of Income Tax.

The obscurity of the law of income tax has, as Mr. Konstam has said, become a bye-word and it is difficult to acquire proficiency in this branch of the law without special study and application. Sir C. V. Ananthakrishna Aiyar when he was the Advocate-General of Madras realised the necessity of specialisation and brought to the notice of the Madras Government the desirability of appointing a Legal Adviser to the Commissioner of Income Tax. Mr. M. Patanjali Sastri, who had already earned a reputation as one of the ablest lawyers of the Madras Bar was immediately appointed. Bengal has also selected a very able, erudite and conscientious advocate of the Calcutta Bar, Dr. Radha Binod Pal, as the Legal Adviser to the Commissioner of Income Tax, Bengal. We hope that in the interests of the Government as well as the public the other Provinces will soon follow the example of Madras and Bengal and retain the services of a lawyer who has specialised in the law of income tax as Legal Adviser to the Commissioner of Income Tax. We have great pleasure in presenting to our readers the portrait of Dr. Radha Binod Pal, the Legal Adviser to the Commisssoner of the premier province of India.

Exemption of Sums Received as Dividends.

A question of great importance to shareholders of limited companies on the one hand and the Crown on the other was raised before the Calcutta High Court in *The Hungerford Investment Trust Ltd., In re,* (to be reported shortly). Section 14 (2) (*a*) of the Indian Income Tax Act provides that tax shall not be payable by an assessee in respect of any sum which he receives by way of dividends as a shareholder in a company where the profits or gains of the company have been assessed to income tax. In assessing Messrs. Turner Morrison & Co. on its profit it was held to be exempt from taxation under Section 4 (1) of the Indian Income Tax Act in respect of Rs. 76,500. A sum of Rs. 7,500 was also held to be exempt from tax under the proviso to Section 8 (tax free securities). The Hungerford Investment Co., (a foreign company) held the whole of the ordinary share capital in Turner Morrison & Co., and received by way of dividends all the profits of the latter company. The income tax authorities levied tax on the sum of Rs. 76,500 on the ground that though it had been received by the assessee by way of dividend, the said amount had not been assessed to income tax in the hands of Turner Morrison & Co. It was contended on behalf of the Crown that the object of the

exemption contained in Section 14 (2) (*a*) is to avoid double taxation and that if a portion of the profits has not been assessed to tax in the hands of the company such profits would not be exempt from tax in the hands of the shareholders to whom they are distributed by way of dividends. Sections 20 and 48 and the form of the certificate prescribed by Rule 14 were relied on in support of this contention.

The learned judges who heard the case, COSTELLO & LORT-WILLIAMS, JJ., held that the question was purely one of construction of Section 14 (2) (*a*) of the Act. COSTELLO, J., said : "Giving to the words of Section 14 (2) (*a*) their plain meaning and without adding to or subtracting from the words of the section itself we are bound to come to the conclusion, whatever the result may be, that there has been assessment on the profits or gains of the company which is sufficient to secure to the shareholders the whole of the dividends, even though those dividends were in fact to some extent paid out of profits or gains in the hands of the paying company which were free from taxation altogether."

The matter is not free from difficulty and the following observations of LORT-WILLIAMS, J., show the necessity of legislative intervention :—

"I agree that this interpretation of the section may enable certain individuals or companies to escape payment of income tax, which it is the obvious intention of the legislature that they should pay. But it is not for this tribunal to remedy that fault. We have to declare the law as it appears in the Indian Income Tax Act and must leave the legislature to consider what steps they may think it necessary to take by way of amendment of the Act, so as to provide for cases similar to this."

COSTELLO, J., also expresses the same idea in these words : "No doubt the intention of the legislature was to provide against double taxation—taxation in the hands of the company which passed the dividend and taxation in the hands of the shareholders who received the dividend. We have however on many occasions expressed the view that it is undesirable and indeed unsafe for this Court or any other Court, in an endeavour to meet a particular situation, to vary the words of a statutory enactment for the purpose of giving effect to what may presumably have been the intention of the legislature."

Hindu Undivided Family: Exemption of Sums Received as Member.

The Patna High Court has in *Commissioner of Income Tax, v. Maharani Lakshmibati Rani Saheba of Darbhanga* (to be reported shortly) made some observations about the expression 'sum received as a member of a Hindu undivided family' in Section 14 (1) of the Indian Income Tax Act which require careful consideration. Section 14, Clause (1) it will be remembered, provides that tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family. AGARWALA, J., (with whom the Chief Justice agreed) says: "sums received as a member of a Hindu undivided family would not be exempt from income tax unless the recipient shows that he had a vested right in the property or income of the family". In their Lordships' view Section 14 (1) merely relieves the assessee from showing that the sum in respect of which he claims exemption has already been taxed in the hands of the family; it does not relieve him from the necessity of showing that the sum received is a part of the income or property in which he had a vested right as a member of a Hindu undivided family. The test of exemption which their Lordships have laid down in this case, namely, whether the recipient had any vested right in the income or property of the family is not quite accurate and is liable to be misconstrued. The real test is whether the sum was received *as* a member, *i.e.*, in the recipient's capacity of a member of the family, whether the fact that the recipient was a member of the family was the cause of the payment. In determining whether the sum was received as a member of the family the fact that the assessee had an interest in the income or property may be a very material factor but we do not think that the existence of a vested interest in the income or property of the family is a necessary condition for claiming exemption from tax under Section 14 (1).

Company Carrying on Several Businesses: Right to Claim Allowances in Respect of Businesses Closed Down.

The recent decision of the Madras High Court in *The South Indian Industrials Ltd.* v. *The Commissioner of Income Tax, Madras* [reported in this issue] deals with a question of far-reaching importance to businessmen, especially to big companies who own several concerns. Some of the concerns may be found unprofitable and may have to be suspended or closed down, but even after they have ceased to work, expenditure may be incurred in connection with those concerns, *e.g.*, by way of interest on borrowed capital, depreciation of buildings and machinery, and establishment charges. Can these losses be deducted from the profits earned by the company in the successful concerns? The Madras High Court has answered the question in the negative. In the case before their Lordships a company received an income of Rs. 1,40,000 by way of dividends in respect of shares which it owned in another company. It had to incur an expenditure of Rs. 1,59,489 in respect of some other concerns of the company which had ceased to work before the year of account, by way of interest on capital borrowed for those concerns, depreciation of machinery, establishment charges, etc. The claim was disallowed. The *ratio decidendi* of the decision of their Lordships is to be found in the following passage which occurs in the judgment:—

"The five concerns in question here were separate businesses and, if those businesses had been carried on during the year of account, the profits and gains of each of them separately would have been arrived at under Section 10 (1) and (2) of the Act after making the allowances given in sub-section (2); and the loss, if any, in any one or more of the businesses thus arrived at would, under Section 24 of the Act, be set off against the profits and gains of the more successful businesses arrived at in the same way and the aggregate income computed. But the assessees are not entitled to adopt this course in the present case, because Section 10 only deals with businesses which are being carried on and not with businesses which have ceased to be carried on, as in the case here. For these reasons the assessees are not entitled to set off the losses as claimed by them which were of a capital nature against the income from dividends."

Again their Lordships said: "The fallacy underlying the assessees' argument is that because a company carries on several

concerns those concerns are all one business, namely, the company's business. That is not so."

Section 24 of the Income Tax Act (the section which provides for set-off of loss in computing the aggregate income) runs thus :—

" Where any assessee sustains a loss of profits or gains in any year *under any of the heads mentioned in Section 6* he shall be entitled to have the amount of the loss set off against his income profits or gains *under any other head* in that year." And Section 6 says: " The following heads of income profits and gains shall be chargeable to income tax ... (*i*) Salaries; (*ii*) Interest on Securities; (*iii*) Property; (*iv*) Business; (*v*) Professional earnings and (*vi*) Other Sources." (Italics are ours.)

Where the assessee is assessed in respect of only one head of income, namely income from business no question of set-off under Section 24 arises. The question is what is the total income of the assessee under the head ' business '. The Act does not contemplate income from each separate business as a distinct head of income for purposes of set-off under Section 24. The section has therefore no application. The two questions that really arise, assuming that the businesses are separate and that for purposes of calculating profits each business is a separate unit, are : (*i*) Whether interest on borrowed capital, depreciation of machinery, establishment charges, etc., which are incurred in connection with a business and would have been allowed as business expenditure cease to be so and become capital expenditure when that business ceases to be carried on; and (*ii*) If so, when exactly does this happen?

On the first question, the decision in *Arunachalam Chetti* v. *Commissioner of Income Tax, Madras* (I. L. R. 52 Mad. 267), throws some light. There a business was closed down in 1924 and it did not function in the year of assessment and the question was whether interest paid on capital borrowed for that business could be deducted from the income from the other businesses of the assessee. The learned judges observed :

" The second point taken was that as the piecegoods business had been shut down in the year 1924, and did not function in the year of assessment, 1924-25, it cannot be said that the capital which had been borrowed was employed in the business during the year of assessment. The money was borrowed for the purpose of

the business and was employed in the business for its purposes until it was lost. Nevertheless interest had to be paid on it and the test seems to us to be not whether it continued to be available for the purposes of the business during the year of assessment but whether it was in its origin money borrowed as capital for the assessee's business and whether interest was in fact paid on that borrowed capital (existing or lost) during the year of assessment."

Arunachalam Chetti's Case has been distinguished in the recent Madras case on the ground that in that case the High Court found that the two businesses were not separate and distinct. The second question does not appear to have been answered on that basis, because obviously, if the business were really one the second question would not have arisen at all as there is no closing down of any business. Again, if as the learned judges now say, the two businesses in *Arunachalam Chetti's Case* were really distinct and the finding in that case was wrong, the actual decision in that case on the facts is all the more favourable to the assessees.

Apart from the above question, which is a difficult one, we think it is clear that unless there be a complete extinction of the business, the deductions should be allowed. The mere fact that owing to financial stress or fear of loss a business was not being actually carried on or was suspended for a particular year or years or that the business done was negligible would certainly not disentitle the assessee to the deductions or convert what would have been business expenditure to capital expenditure. The business really continues or must be deemed to continue in such cases. In order that expenditure may become capital expenditure the business must have ceased to exist altogether and this requires a definite intention on the part of the assessee to stop the business.

So long as the capital invested retains the character of capital invested in the business and is not dissociated from the business, so long as machinery are still associated with the business and not regarded as mere chattels owned by the assessee independent of the business, we think claims for interest on borrowed capital and depreciation of machinery should be allowed even though the business is not actually working. The test is not whether actual business was being carried on, but whether the business had been wound up and ceased to exist.

THE NEW YEAR.

We wish a happy New Year to all our subscribers and express our thanks for their kind patronage and warm support. From this year it is proposed to print also the order of reference made by the Commissioner in the cases that are reported by us, except in cases where the printing of the reference would merely lead to repetition of the same matter. It is also proposed to issue a quarterly digest of income tax cases to facilitate reference to the current cases. Each quarterly part will contain all the earlier cases of the year and the last quarterly part will be issued as the Annual Digest of Income Tax Cases.

NOTES AND COMMENTS.

Reference : General Questions Condemned.

In a recent case before the Rangoon High Court *Commissioner of Income Tax, Burma* v. *V. S. A. R. Firm* [1935 I. T. R. 64] the question referred by the Commissioner was : " Whether on the facts of this case the sum of Rs. 23,373 was rightly included in the assessment." Instances in which questions are framed in such a vague and general manner are becoming more frequent, as the reports show, and the learned Chief Justice of the Rangoon High Court (Sir Arthur Page) has acted very wisely in pointing out to the Commissioners that if questions are framed in this manner the High Court would refuse to answer them. His Lordship said :

" If we were to consent to go into the matter in such circumstances the Court will be flooded with applications in which without setting out a point of law the Court would be invited to determine generally whether the conclusions of the income-tax authorities were correct or not. In other words, the Court would take upon itself the burden of investigating the facts for the purpose of finding out whether under any section of the Act a point of law could be extracted therefrom and then determine it. That is not the scheme of the Act, and we decline to answer a question which in effect would amount to a general appeal from the income-tax authorities. It is the duty of the Commissioner in a case stated to set out specifically the particular point of law upon which it is sought to obtain a determination from the High Court."

Apart from this aspect of the matter it may also be observed that unless the particular point or points of law that arise in a case are ascertained by the Commissioner he would not be able to state his conclusions of fact and law separately— a matter which is of great importance as he is the final authority on questions of fact, and the High Court, on questions of law. The proceedings are also bound to be somewhat slovenly and confused unless the specific questions of law that arise are clearly ascertained beforehand.

In regard to this it has however to be observed that the blame does not rest so much with the Commissioners as with the assessees. When an assessee is not able to find out any specific question of law in his case he frames a general question in this way. We think that, especially in view of this pronouncement of the

Rangoon High Court, the Commissioners should, in their turn, insist on the assessees stating in their applications the exact points of law that arise, and should decline to state a case if the assessee is not able to do so. The general question "Whether on the facts the sum of...was rightly assessed" can be raised in any case and if this is to be taken to be a question of law contemplated by Section 66 of the Income Tax Act there would in effect be a general right of appeal in every case, as the learned Chief Justice has said.

Assessment of Building in which Company 'Resides'.

An interesting question which is of considerable importance to companies arose in the case of *The Calcutta Stock Exchange Association, Ltd.*, decided by the Calcutta High Court (to be reported shortly). Section 9 (2) of the Indian Income Tax Act which deals with assessment of property declares that 'annual value' means the sum for which the property might reasonably be expected to let from year to year but provides that where the property is in the occupation of the owner for the purposes of his own residence such sum shall be deemed not to exceed 10 per cent. of the total income of the owner. The decisions have established that a company can have a residence and that a company resides for purposes of income-tax where its real business is carried on. The Calcutta Stock Exchange Association owned a building which contained halls which were used as the meeting place of the Stock Exchange and the Association, and some rooms which were let out by the Association to its members for conducting their business as member. The company was assessed at Rs. 59,798 which included Rs. 24,117 which was the *bona fide* annual value of the building. The company contended that this building must be deemed to be in the occupation of the company for the purposes of its own residence within the meaning of the proviso to Section 9 (2). The High Court agreeing with the income-tax authorities, held that the word 'residence' as used in Section 9 (2) did not mean residence in its extended sense as applied to a company but is used in its simple and ordinary meaning signifying the place were a human being eats, drinks and sleeps or where his family or servants eat, drink and sleep. In their Lordships' opinion there is no justification for giving to the word 'residence' in Section 9 (2) the extended meaning nor did the legislature intend that such an extended meaning should be given to it. The use of the word 'own' indicated that the proviso could only apply to a human person or persons and not to a fictional person such as a limited liability company. As the question is one of first impression and there is much to be said on

the other side also we hope some company would soon take up the matter to the Judicial Committee for an authoritative decision.

Reference from Commissioner's Order in Revision : 'Order Prejudicial to Assessee,' Meaning of.

Under Section 66 (2) of the Indian Income Tax Act as amended in 1933 an application for reference may be made in respect of any question of law arising out of an order under Section 33 enhancing an assessment or otherwise prejudicial to the assessee. It was contended in a recent case before the Madras High Court that the expression 'otherwise prejudicial to the assessee' would include an order made by the Commissioner in revision refusing to interfere with an order passed by the Income Tax Officer if the Income Tax Officer's order was prejudicial to the assessee. The High Court had no difficulty in rejecting this contention. The Chief Justice said that what the expression contemplates is an order made by the Commissioner which *alters* the position of an assessee or an applicant to that person's prejudice. Where an assessee's position has already been prejudiced by an order of the Income Tax Officer and the Commissioner merely leaves him there by refusing to interfere with that order the Commissioner's order is not an order prejudicial to the assessee within the meaning of Section 66 (2) and an application for reference does not lie in such a case. [*N. A. S. V. Venkatachalam Chettiar's Case* 1935 I.T.R. 55].

Foreign Remittances : Theory of Constructive Remittance.

The law relating to the assessment of remittances to British India from foreign branches has already given rise to many difficult questions. An interesting theory, the theory of constructive remittance is slowly developing. In a recent case which was heard by a Special Bench of the Madras High Court [BEASLEY, C.J., RAMESAM, J., and KING, J.] the assessee was a partner in two firms, one in Bassein in British India and the other in Ipoh in the Federated Malay States. The British Indian firm had borrowed a certain sum of money from the latter. The assessee became the sole owner of both the firms and the debt was automatically extinguished. The Commissioner held that since a debt in British India had been wiped out by a corresponding diminution in the assets in a foreign branch there was a constructive remittance from the foreign branch and the assessee could be assessed in respect of the amount of the debt. The High Court did not agree with the Commissioner.

Referring to the moneys which had been remitted to British India as a loan BEASLEY, C. J., said:

"What happened was that by reason of the assessee becoming the sole proprietor of both businesses the character of that money was changed and instead of being a loan it became the assessee's own money. There was in no sense an actual transfer of any money from Ipoh to Bassein nor was there even a constructive one if such a transfer as that can under the Indian Income Tax Act be recognised, as to which some doubts have been expressed."

In the case before their Lordships there was no remittance, actual or constructive, as the learned Chief Justice has rightly observed. There was only an extinguishment of a debt by operation of law by the debtor and creditor becoming one. The case is similar to one where the debtor succeeds to a foreign creditor as an heir or where a foreign creditor gives up the debt. It cannot be said that there is a transfer of money in such a case though a British Indian liability is extinguished.

The theory of constructive remittance referred to by the learned Commissioner in his order of reference, though inapplicable to the particular case, is an attractive and interesting one and we await with interest its further developments. There is some foundation for the doctrine and income tax on foreign profits can be easily evaded if this doctrine is entirely eschewed. An assessee who makes a profit of, say Rs. 50,000, in a foreign business may instead of remitting the profits to British India easily borrow for his Indian business the same amount from a foreign friend and ask his foreign office to pay him off. The theory of constructive receipt or remittance may have to be resorted to in such cases.

Capital Expenditure and Revenue Expenditure: Imperial Chemical Industries Case.

Whether an expenditure incurred is a capital expenditure or business expenditure is one of the most difficult problems that income tax authorities have to solve. The question is one of such perplexity that the only conclusion on which the Judges seem to agree is that it is not possible to lay down any hard and fast rule or to enunciate any rigid and scientific principle which can be applied as a sure criterion. In the decided cases however, experienced Judges have applied some important tests which, though not conclusive are of very great assistance in determining this difficult question and, apart from the actual decision in the case, the judgment in *Imperial Chemical Industries (India) Ltd., In re* [1935

I.T.R. 21] is a valuable contribution to income-tax law as it contains a learned discussion of the tests laid down by the English Judges. These tests may briefly be summarised thus :—

(1) In *Vallambrosa Rubber Co.* v. *Farmer* [5 Tax Cas. 529] LORD DUNEDIN suggested one test, *viz.*, whether or not the payment was of a kind which would be made 'once and for all' by way of a lump sum. Though this is a material consideration it has been held that this is not a decisive test as there are many cases in which a payment, though made once and for all, would be properly chargeable against the receipts for the year.

(2) In *British Insulated and Helsby Cables* v. *Atherton* [1926 A.C. 205] LORD CAVE said : 'When an expenditure is made not only once and for all but with a view to bringing into existence an asset or an advantage for the enduring benefit of the trade, there is a very good reason for treating such an expenditure as properly attributable not to revenue but to capital. This test is further elaborated by LORD ROMER thus : (*i*) It is enough if the expenditure is incurred 'with a view' to produce an enduring benefit. It is not necessary that it should have that result. (*ii*) Further, 'enduring' means 'enduring in the way that fixed capital endures.' (*iii*) The advantage need not be of a positive character, it may consist in getting rid of an item of fixed capital of an onerous nature. [See *Anglo-Persian Oil Co.* v. *Dale* (1932, 1 K. B. 124).]

(3) In the same case LORD BLANESBURGH has suggested two further tests: (*a*) Whether the expenditure did involve any withdrawal of capital; and (*b*) what would be forthcoming in a liquidation as a result of the expenditure which has been made when the liquidator attempts to realise the company's assets. Of these LORD CAVE's test, as explained and elucidated by LORD ROMER seems to be the most important one.

Costello, J.'s Advice to Commissioners.

In his judgment in *The Imperial Chemical Industries (India), Ltd., In re,* [1935 I. T. R. 21] COSTELLO, J., has drawn the attention of Commissioners of Income Tax in India to an important observation of ROMER, L. J., in regard to the determination of the question whether an expenditure is capital expenditure or revenue expenditure. After referring to LORD CAVE's test and explaining it, ROMER, L. J., said in the *Anglo-Persian Oil Co.'s Case* :—

"This being the test to be applied in such cases as the present it is obvious that the question whether an expenditure made once and for all is or is not to be treated as chargeable to capital and not revenue is one of fact only. Being a question that the Commissioners are eminently qualified to answer, it is to be hoped that in future they will answer it by reference to the language of the test laid down by LORD CAVE and not as though they are deciding a question of law. Too often in the past, the Commissioners have found that a particular sum is or is not a permissible deduction. That is a question of law or at any rate, mixed law and fact. If they will find that the expenditure in question was or was not made as the case may be, with a view to bringing into existence some asset or advantage for the enduring benefit of the trade, their finding will be one of fact, and if there be some evidence upon which the finding can reasonably be made it will not be subject to review in the Courts."

This passage might very well be taken to heart, says COSTELLO, J., by the Commissioners of Income Tax in this country.

Adventure in the Nature of Trade and Isolated Transaction Unconnected With Trade.

This distinction between an adventure in the nature of trade, the profits derived from which are assessable, and an isolated transaction unconnected with the business activities of the assessee is well illustrated by the recent decision of the Madras High Court in *Mothay Gangaraju* v. *Commissioner of Income Tax, Madras* (reported *infra* at p. 58). The assessee was a land owner and money-lender. He purchased the interest of a stranger, in certain legacies at a court auction for Rs. 39,800. There was much litigation over the legacies but the assessee was ultimately successful and recovered Rs. 1,97,025 on this account. He had spent nearly Rs. 46,625 odd in all over this affair and he was assessed on the profits made, namely, Rs. 1,50,399 on the ground that it was income from an adventure in the nature of trade. It was argued that the assessee had made a speculation using his capital and had made a large profit thereby and that the adventure was one in the nature of trade. The High Court held that the income was not assessable. BEASLEY, C. J., said :

"In our view this cannot be described as an adventure or concern in the nature of trade. The trading activities of the assessee were limited to lending money, owning land, if that can be called a trade, and having an interest in cotton mills and this is in no sense

a transaction related to any of those activities. In this case the interest in the legacies was not even purchased from anybody who was indebted to the assessee in his money lending business. It was an isolated transaction, though probably entered into by him by way of speculation, as he happened to make a good profit out of it. We are quite unable to see that it has any connection whatever with any other trades or businesses carried on by the assessee. By itself the purchase of an interest in legacies, the subject of litigation cannot certainly be described as a trade or a business."

The case of *Rutledge* v. *Commissioners of Inland Revenue* [14 Tax Cas. 490] where a businessman purchased at a very cheap price a large quantity of paper while he was on a visit to the continent and made a profit by selling the consignment on his return to England, was distinguished by the Chief Justice on the ground that the nature of the article purchased in that case and the quantity purchased clearly showed that it was a business transaction. This decision of the Chief Justice shows that the mere fact that a transaction was speculative in nature and was entered into with a view to make profit does not render it a trade or business.

PROGRESS OF THE LAW OF INCOME-TAX DURING THE YEAR 1934—II.

(*Continued from page 5 of January number*)

Some important decisions affecting MONEY-LENDING BUSINESSES were pronounced in 1934. First, as to assessment of *Interest*: In *Ahmed Din Alla Ditta* v. *The Commissioner of Income Tax, Punjab* [1934 I.T.R. 369] where interest which had accrued due on a promissory note was added to the principal and a fresh note was executed for the aggregate amount and the assessee kept his accounts in the mercantile system, the Lahore High Court held that the interest so included was assessable to income tax in view of the fact that the assessee followed the mercantile system, even though the assessee had not actually received it. We have expressed our doubts about the correctness of this decision. The Privy Council have expressly decided in the *Maharaja of Darbhanga's Case* [1933 I.T.R. 93] that the giving of a promissory note for a debt does not amount to a receipt of the amount and the addition of interest in executing a fresh note cannot stand on a different footing. The fact that the method of accounting adopted by the assessee is the mercantile system cannot change the legal nature of the transaction. In *Lambe* v. *Inland Revenue Commissioners* [1934 I.T.R 494] FINLAY, J., has also laid down in England that interest which has accrued due cannot be assessed

unless it has been actually received by the assessee. The decision of the Lahore High Court is not binding on the other provinces and this decision therefore has to be received in the other provinces with some caution.

The second decision which has to be noted is the well considered decision of the Rangoon High Court in *Commissioner of Income Tax, Burma* v. *P. L.S.M. Concern* [1934 I.T.R. 417] in which the learned Chief Justice of the Rangoon High Court has laid down in detail the correct procedure to be followed by income-tax authorities when a money-lender who had to take the properties of his debtor in satisfaction of the debt makes a profit by resale of the properties. The question whether profits made by sale of mortgaged property are assessable as profits of the business was answered in the affirmative by the Madras High Court in *S.R.M.S. Subramanyam Chetty* v. *Commissioner of Income Tax, Madras,* [1934 I.T.R. 295], and the decision of the Lahore High Court in *Sonaram Nihalchand* v. *Commissioner of Income Tax,* [1934 I.T.R. 489] shows that the income-tax authorities are entitled to call upon the assessee to produce his account books relating to foreign branches to verify the accounts produced and to make presumptions against the assessee if he fails to produce them. The decisions relating to bad debts have already been adverted to.

With regard to MUTUAL BENEFIT SOCIETIES, in *Commissioner of Income Tax, Madras* v. *Madhwa Siddhanta Onnahini Nidhi* [1934 I.T.R. 427] the Madras High Court has held that in order to claim exemption under Section 10 (2) (*iii*) there must be recurring subscriptions paid by the members periodically and that if a mutual benefit society transacts banking business with stangers the guaranteed interest paid to the members is not exempt from tax.

Three noteworthy decisions have been pronounced relating to PARTNERSHIPS. In *Commissioner of Income Tax, Madras* v. *Karuppaswami Mooppanar* [1934 I.T.R. 284] it was decided that when some of the partners retire receiving from the sole surviving partner, their share of the capital and profits, the surviving partner who takes up the business of the firm is not entitled to deduct the interest so paid by him to the outgoing partners as interest on borrowed capital. In the next case *Commissioner of Income Tax* v. *Muthukaruppan Chettiar* [1934 I.T.R. 506] the same High Court has held that when a partner retires receiving his share of the capital and profits, the entire amount received by him is a capital receipt and that he is not taxable even in respect of the share of the profits received by him. The third case relates to a partner's right to

set off his ex-partner's share of loss which he had to bear on account of the insolvency of the latter. This was held to be a capital loss in *Rm. A. R. Rm. Arunachalam Chettyar's Case* [1934 I. T. R. 401] from which their Lordships have recently granted leave to appeal to the Privy Council. The decision of the Court of Appeal of England in *Heastie* v. *Veitch & Co.*, [1934 I.T.R. 456] may also be referred to here as it throws much light on the question whether and if so, when, salaries paid to partners can be deducted as business expenditure in assessing the profits of a firm.

The true principle on which the maximum amount of PENALTY that could be imposed under S. 28 of the Income Tax Act, depends which was once stated by the Chief Justice of the Rangoon High Court in *The Commissioner of Income Tax, Burma* v. *A. A. R. Chettyar Firm* [12 Rang. 258] was re-affirmed in *K.M.O. Chettyar Firm's Case* [1934 I. T. R. 195] and *A.A.R. Chettyar Firm* v. *Commissioner of Income Tax, Burma* [1934 I.T.R. 386].

The question whether associations like POOLING COMBINATIONS can be assessed to income tax and if so how they are to be assessed has been referred to the Lahore High Court in the *Lahore Ice Factories Association's Case* [1934 I.T.R. 392].

The decision of the Rangoon High Court in *Sonaram Rameshwar* v. *Mary Pinto* [1934 I.T.R. 58] establishes the PRIORITY OF INCOME TAX DEBTS over other unsecured debts of the assessee and in *Beni Felkai Mining Co., In re* [1934 I.T.R. 309] the English Courts have laid down the procedure to be followed when the question of priority arises between liquidator's remuneration and income tax.

As to PRIVY COUNCIL APPEALS, the Allahabad High Court has ruled in *Gurmukh Rai* v. *Secretary of State for India* [1934 I.T.R. 412] that an order made by the High Court declining to require the Commissioner to state a case is not a judgment on a reference within Section 66 (2) and that the High Court has therefore no power to grant leave to appeal to the Privy Council in such cases. The proper remedy of the assessee is to apply to the Privy Council itself for special leave.

On the subject of RE-ASSESSMENT (Section 34) two decisions have to be noted. First, the decision of the Privy Council in *Sir Rajendra Nath Mukerjee's Case* [1934 I. T. R. 71] which establishes that though the language of the Indian Income Tax

Act is naturally suited to the normal case of taxation carried through all its processes within the compass of the tax year, there is no provision in the Act, express or implied, prohibiting the making of an assessment after the expiry of the tax year. Income which has been duly returned cannot be said to have 'escaped assessment' within Section 34 though it has not been taxed within the assessment year and if the proceedings for assessment have not been closed there is no objection to tax even after the termination of the assessment year. The second case, *Burn & Co., In re* [1934 I.T.R. 30] decides that the expression 'in any year' in Section 34 means the year during which the proceedings in assessment in respect of that very year should have been initiated, that is, the actual twelve months in which an assessment would normally and properly be made and a notice which is not served within the period prescribed by Section 34 as so understood is invalid. This case also shows that Section 34 does not require a notice in any prescribed or standard form.

As to REFERENCE by the Commissioner the following decisions may be noted:

(*i*) The question whether a reference lies where the income tax authorities proceed under the proviso to Section 13 (that is, when they find that the assessee's method of accounting is insufficient and adopt such method as they please) is considered by the Bombay High Court in *Narayan Atmaram Patkar's Case* [1934 I.T.R. 486] and the Lahore High Court in *Neki Devi's Case* [1934 I.T.R. 365] and *Rulia Mal's Case* [1934 I.T.R. 329.]

(*ii*) The deposit of Rs. 100 forms part of the costs of the reference. *Milne's Case* [1934 I.T.R. 25.]

(*iii*) Power of High Court to raise questions not raised before Commissioner is considered in *C. P. L. E. Chettyar's Case* [1934 I.T.R. 201]; *Khemchand Ramdas's Case* [1934 I.T.R. 216]; *Narayan Atmaram Patkar's Case* [1934 I. T. R. 486] and *Neki Devi's Case* [1934 I.T.R. 365]. The opinion is not uniform.

(*iv*) The competency of references from orders made in revision by the Commissioner and the effect of the amendment of Section 33 are considered in *Tata Hydro-Electric Agency, Ltd., In re* [1934 I.T.R. 103] and *Sheik Ata-ur-Rahman's Case* [1934 I.T.R. 339.]

(*To be continued*).

NOTES AND COMMENTS.

Hindu Undivided Families Saved From Double Supertax.

The wording of Section 55 of the Indian Income Tax Act is somewhat unguarded and the income tax authorities of the United Provinces sought to put an interpretation on the section which would have subjected Hindu undivided families to double super-tax. The Allahabad High Court has fortunately rejected this interpretation. The first part of Section 55 provides for levy of super-tax on any *individual*, *Hindu undivided family*, company, unregistered firm, etc., and the proviso says that where profits of an unregistered firm, have been assessed to super-tax, super-tax shall not be payable ' by an *individual* having share in the firm ' in respect of the amount of such profits which is proportionate to his share. It was contended ' strenuously ' for the revenue authorities that as the proviso only refers to individuals a Hindu undivided family which is a partner in an unregistered firm is not exempted by the proviso from payment of super-tax on its share of the profits of the firm even though super-tax has once been paid on the same by the firm. Carelessness of the législature and strict rules of interpretation had to give way to common sense and justice. Their Lordships said that, though ordinarily where the same word occurs in two different parts of the same section the same meaning should be assigned to it, yet if there is anything in the context to indicate a different meaning or the principle underlying the section makes it more logical to assign a different but legitimate meaning it is permissible to construe the same word occurring in two parts of the same section differently. Though the word ' individual ' in the main section does not obviously include a Hindu undivided family yet the word is wide enough to include a group of persons and is used in the proviso in its wide sense to indicate a component part of an unregistered firm, whether it be a person or an undivided Hindu family. As their Lordships said if the contention of the revenue authorities was accepted the result would be anomalous and the object of the Act would be frustrated.

Income Tax on Unrealised Interest: An Allahabad Ruling.

Our readers may remember the decision of the Lahore High Court in *Ahamad Din* v. *Commissioner of Income Tax*, *Punjab* reported by us last year [1934 I.T.R. 369] in which it was held that where the system of accounting adopted by the assessee is the mercantile system of accounting, if interest was credited in the

accounts it can be assessed to income tax even though it had not been actually paid to, or realised by, the assessee. We had expressed some doubt on the correctness of this decision (See 1934 *Income Tax Reports*, Notes and Comments, page 63) and stated that the real test is not whether the basis of accounting is cash or mercantile but whether there has been a real receipt of interest—receipt in cash, in kind or by adjustment. An argument similar to that advanced before the Lahore High Court based on entries in the assessee's accounts was urged recently before the Allahabad High Court in *Sahu Jaga Mandar Das* v. *Commissioner of Income Tax, U.P.*, (to be reported shortly). In the assessee's books in the ledger of a debtor a certain amount due from him (for which the assessee had obtained a decree) was credited to the mortgagor and also debited. The amount was also shown in the interest ledger as an amount to be realised. It was claimed for the income tax authorities that, as the assessee had shown the amount of interest in his books the amount could be assessed. The assessee contended that the system of keeping account adopted by him was simply for the purpose of ascertaining the financial state of his business. Their Lordships said ' we consider that the Department was correct in claiming that the assessment should be made on the books under Section 13, but we do not think that the Department had used the books in the right way.' Their Lordships then referred to the principle that interest could not be assessed unless it was realised and to the cases bearing upon the point and held that the interest in question was not assessable. To the question referred by the Commissioner, *viz.*, whether the system of keeping the account adopted by the assessee is simply for the purpose of ascertaining his financial state in the particular year or is open to the interpretation put by the revenue authorities, their Lordships gave the answer that the assessee was correct in stating that the books were simply kept for the purpose of ascertaining his financial state. This decision supports the view we had advocated in our comments that the mode of accounting followed by the assessee upon which so much stress was laid in the Lahore case is not a criterion at all. The test as we have said is whether in the eye of the law there was a receipt of the amount, and the Allahabad decision undoubtedly lays down the correct view.

Interest Credited in Bankers' Accounts.

The decision of the Nagpur Judicial Commissioner's Court in *Bikhamchand Lakshmi Chand* v. *Commissioner of Income Tax*.

Central and United Provinces (to be reported in the next issue) shows that there is an important distinction between cases where a person credits in his own accounts interest to be received from his debtor, for book-keeping purposes, and where a banker credits his customer with the interest due to the customer in his (the banker's) accounts. An entry in a banker's accounts is like an entry in pass books sufficient to constitute a receipt of money lying in a bank realisable at the will of the customer. Referring to the cases in which it was held that what is merely credited in the creditor's accounts but not received from the debtor is not taxable, the learned Judges rightly pointed out as follows :—

"Several cases have been cited before us in which the assessee made entries in his own accounts showing that interest had become due to him from his debtors, but those cases are not in point."

The following observations of SADASIVA AYYAR, J., referred to by the learned Judicial Commissioners bring out the point clearly :

"If an assessee chooses to leave his interest income with his customer, who is also a banker, and does not bring it into his accounts, as income on the date it falls due, but he knows that his banker-customer would credit the money in his accounts in favour of the assessee and allow him interest thereon from the date of its accrual or if the assessee could at any time draw upon the customer for that money and obtain actual receipt of that sum in due course of business, I think that such interest income has accrued and arisen in that year in such a manner that the legal effect is the same as if it had been 'received' by him and that it is liable to be charged to income-tax thereon." The bank in such cases must be deemed to have paid the money to itself to the credit of the assessee and to hold it as the assessee's banker.

Advancing Money In Consideration of Share In Fruits of Litigation.

A case somewhat similar to that of *Mothey Ganga Raju* v. *Commissioner of Income Tax, Madras* [1935 I.T.R. 58 ; February number] was heard by the Allahabad High Court in *Gaya Prasad and Chotelal, In re* (to be reported) but their Lordships have come to an opposite conclusion. The assessees undertook to supply funds to a third person for conducting an appeal on the condition that the latter should repay the money with an additional sum of Rs. 21,000 if he succeeded. If he failed he was not to pay anything. The appeal was successful and the assessees

received Rs. 15,000 in the year of account under this agreement, and the question was whether this receipt was an income from business which could be assessed to income-tax. The decision of the Privy Council in *Shaw Wallace's Case* and the definitions of income and business given in the judgment in the said case were relied upon by the assessees. But their Lordships held that that case was distinguishable. Referring to that case the learned Judges said:

"We are unable to hold that their Lordships intended to lay down that unless the source of income is one which yields income periodically and not only once the income derived from it cannot be assessed to tax. Circumstances are easily conceivable in which there can be no doubt that the receipt of a sum of money is the income, profit or gain from business and yet it accrued only once."

And on the facts they said: "We are conclusively of opinion that the transaction amounted to business within the meaning of the Income Tax Act. We are unable to hold that this income was of a purely casual nature. To hold otherwise would imply that the income, profits or gains accruing from the single transaction or investment which is not akin to the assessee's trade or avocation is not income, gain or profit from the business, which in our opinion is contrary to the words employed in the Act. That a single transaction or investment may be business cannot admit of doubt. Any receipts exceeding the capital must be treated as profit."

With all respect to their Lordships the income in question cannot be said to be income from a business carried on by the assessees. Their Lordships of the Privy Council have clearly pointed out that 'business' connotes continuity and regularity of transactions. If the principle laid down in the Allahabad case is to be applied, income from lotteries would be taxable, profit gained by an isolated transaction of purchase and sale of a property would be taxable. Their Lordships appear to have been carried away by the notion that 'any receipts exceeding capital must be treated as profit.' That there may be accretion to capital which is not of the nature of income has been ignored. We think that the receipt in question is not 'income' in the true sense of the 'word', much less income from 'a business'. To use the words of SIR OWEN COMPTON BEASLEY in *Mothey Ganga Raju's Case*, (1935 I.T.R. 58) it is a receipt from an isolated transaction in no way connected with any other trade or business activities of the assessee. His Lordship said in that case that "by itself the purchase of an interest in legacies

the subject of litigation cannot certainly be described as a trade or business." An isolated transaction of loan to an individual for a specific purpose cannot be said to be a business in itself though it results in some gain.

In the *Commissioner of Income Tax, Burma* v. *J. I. Milne* (1934 I.T.R. 25) in consideration of a loan of Rs. 10,000 advanced to a mining engineer for working certain mines the latter promised to pay one-third of the price that the mining area might fetch on sale. The one-third price paid to the lender by the debtor was held to be a receipt of a casual nature not arising out of business. (Per PAGE, C.J., DAS and MYA BU, JJ.). The Allahabad case does not differ from this on principle and we regret that this case which is reported also in the authorised series (See I.L.R. 11 Rangoon 454) was not brought to the notice of the learned judges of the Allahabad High Court.

Notice of Return not Giving Thirty Days' Time.

A short point which Income Tax Officers may note was decided by the Lahore High Court in *Jamna Dhar Potdar and Co., Lyallpur* v. *Commissioner of Income Tax, Punjab* (reported *infra* at p. 112). Under Section 22 (2) of the Indian Income Tax Act thirty clear days must be given for furnishing the return, and if a notice under the said section does not give this minimum period of time the notice is illegal. It was further held in this case, following the decision of the Allahabad High Court in *Kajori Mal Kalyanmall's Case* (122 I.C. 741), that a subsequent extension of time will not cure the defect. If a notice has been served by inadvertence without giving 30 days' time, there is no use of giving a further extension of time. A fresh notice giving 30 days' time must be issued.

PROGRESS OF THE LAW OF INCOME TAX DURING THE YEAR 1934—III.

(Concluded from page 22 of February number.)

As to the Commissioner's powers of REVISION (Section 33) *Khemchand Ramdas's Case* [1934 I. T. R. 217] shows that these powers should not be so exercised as to deprive the assessee of the benefit of the time limit prescribed in Sections 34 and 35.

With regard to assessment of SUCCESSORS the decision of the Privy Council in *Maharaja of Dharbanga's Case* [1934 I.T.R. 345] lays down that even in the case of an assessee who dies before

the return is filed, proceedings can be taken against his successor under Section 26 (2) and that Section 26 (2) is not confined to succession *inter vivos*. The decision of the Rangoon High Court in *Commissioner of Income Tax* v. *N. N. Firm* [1934 I.T.R. 85] lays down that succession to business contemplated by Section 26 (2) is succession to the business as a whole not to a part only, and there must also be continuity in the business.

That TRUSTEES can be properly assessed in respect of the income of the trust is established by the decision of the Privy Council in the *Currimbhoy Ibrahim Baronetcy Trust Case* [1934 I. T. R. 151], even though there is no express provision in that behalf in the Indian Act. This decision also throws much light on the circumstances under which trustees could be assessed in respect of income paid over by them to the beneficiary. The practical difficulties that may arise in calculating the total income for purposes of graduation of tax when the trustees are made liable also for income paid to beneficiaries still remain unsolved.

NOTES AND COMMENTS

Lease of Factory: Lessor's Right to Claim Depreciation Allowance.

An important question relating to allowance for depreciation of buildings and machinery was raised in *Sadhucharan Roy Choudhury and others, In re* [1935 I.T.R. 114]. The owner of a jute press leased it out to a company at a fixed rent. He was assessed on the income from the transaction of letting out as "income from other sources" under Section 12, Income Tax Act, and a claim made by him for allowance in respect of the depreciation of the buildings, plant and machinery leased out by him was disallowed by the income tax authorities on the ground that the transaction of letting out was not a business and the claim not being one in respect of any buildings, plant or machinery 'used for the purpose of the business,' Section 10 (2) (*vi*) had no application. The High Court refused to accept the reasoning of the income tax authorities and held that the assessee was entitled to the allowance claimed. In their Lordships' opinion the letting out of a factory like the one in question at a rent was a business—as much a business as the letting out of a ship for freight or the letting of a motor car or any other kind of machine or machinery for hire—and the claim was clearly covered by Section 10 (2) (*vi*) of the Income Tax Act. As their Lordships have pointed out, the Crown would not suffer in such cases if an allowance were made to the lessors for depreciation under Section 10 (2) (*vi*), because the lessees could not claim depreciation under that section as the buildings etc., are not the property of the lessees within the meaning of Section 10 (2), but of the lessors.

'Hindu Undivided Family': A New Interpretation.

The Calcutta High Court has, in *Moolji Sicka's Case* [1935 I.T.R. 123], come to the conclusion that 'where in the sections of the Income Tax Act a Hindu undivided family is mentioned a Hindu co-parcenary is meant.' The proposition is so inconsistent with our current notions with regard to the meaning of the expression 'Hindu undivided family' that the decision requires careful scrutiny.

The question in the case was whether in respect of the income from the self-acquired property of a Hindu who has a wife

and children he can claim to be assessed as a Hindu undivided family. The answer is easy enough and for the purpose of answering this question it was quite unnecessary to hold that a Hindu undivided family means a co-parcenary. Income from the self-acquired property of a member so long as it has not been thrown into the common stock is the income of the individual member and not the income of the family—whether family means a co-parcenary or is used in a wider sense does not arise at all. Their Lordships however, appear to have thought that the question depended on whether 'Hindu undivided family' meant a co-parcenary or a joint family in the ordinary sense and the correct conclusion could be arrived at only by giving a restricted meaning to the expression. The judgment contains a long discussion of the rights of wives and sons in regard to self-acquired property under the old Hindu Law texts but, as their Lordships have finally observed, whatever these rights may be, the Income Tax Act is not concerned with them. The relevant portion of the judgment is the statement that

"the legislature did not intend to enact and has not enacted that a Hindu undivided family in these wider senses is a proper object for taxation under the Income Tax Act. If it were otherwise, a most absurd and unanticipated position would arise. Every Hindu possessing property or income who married, would *ipso facto* become with his wife a Hindu undivided family and subject to taxation as such. The Income Tax Act, so far as Hindus are concerned as individuals would apply only to bachelors. This cannot have been intended."

These observations are clearly based on some mis-apprehension. With respect to income from separate property there is no reason why a Hindu who has married and has children cannot be assessed as an individual. It is only with regard to income from property which is ancestral and over which a Hindu has not got absolute powers of disposal, that he is to be assessed as a Hindu undivided family. The test is not whether the Hindu is married or not but the nature of the income—whether the income is derived from property of which he is the sole owner, or from property which is not his absolute property but which he holds as manager of a Hindu family and in which other persons have certain rights under the rules of Hindu law.

The trend of decisions has clearly been uniformly against the view now taken in *Moolji Sicka's Case.*

In *Vedathanni's Case* [1933 I. T. R. 70] decided by SIR H. O. C. BEASLEY, C.J., SIR V. RAMESAM and CORNISH, JJ., where a Hindu family consisted of a sole male member and the widow of a deceased member it was held that the sums received by the widow by way of maintenance were sums received by her as 'member of a Hindu undivided family'. Clearly this negatives the view that 'a Hindu undivided family' in the Income Tax Act necessarily means a co-parcenary.

In *Nathu Sao* v. *Commissioner of Income Tax, C. P. and Berar* [1933 I.T.R. 463] it was similarly held that where a Hindu lives jointly with the widows of deceased co-parceners they constitute a Hindu undivided family and should be assessed as such and that the fact that there was only one male member was immaterial. The learned Judicial Commissioners expressly point out the difference between a co-parcenary and a joint family and are clearly of opinion that the term Hindu undivided family in the Income Tax Act means a joint family in the wider sense and not merely a co-parcenary.

The distinction between a Hindu co-parcenary and a Hindu joint family is a very old and well recognised one and we do not think there is any justification for restricting the meaning of the term 'Hindu undivided family' in the Income Tax Act to Hindu co-parcenaries when legislature has advisedly used the term Hindu undivided family.

Assessment of Unrealised Interest on Renewal of Promissory Notes.

There are decisions which are apparently contradictory on the question whether interest which has not been actually received but which has been credited in the accounts can be assessed to income tax and we had occasion to refer to this subject more than once. In this issue we are reporting the case of *Sahu Jagmandar Das and others* v. *The Commissioner of Income Tax, U. P.* [see p. 140 *infra*] in which the Allahabad High Court held that if interest has not been realised, though a decree has been obtained for it, it cannot be assessed and mere credit entries relating to such interest in books kept by the assessee for the purpose of ascertaining the financial state cannot make any difference. A recent decision of the Rangoon High Court in *Commissioner of Income Tax, Burma* v. *V.S.U.R. Firm* [to be reported in the next issue] deals with the question whether interest can be assessed when a promissory note is renewed and fresh note is executed for the capital and interest due

on the prior note. According to the usage of the Chettiyar bankers of Burma it appears that so long as a pro-note or document is outstanding only cash receipts from the debtor are shown in the accounts but when this pro-note or document is cancelled and a fresh one executed for the amount of the principal of the loan and the interest which has accrued on it, the principal and interest are shown in the accounts as paid by the debtor. The assessee, a Chettiyar firm, in a particular year contended that interest so included in the renewed notes could not be assessed though shown in the accounts as received. The Rangoon High Court held that the interest was assessable to income-tax. PAGE, C. J., said : "In the present case the assessees have elected to treat the interest due under the original loans as having been received and paid on the execution and delivery of the fresh promissory notes by the debtors, and the interest is entered as having been received both in the interest account and in the personal accounts of the respective debtors ; and the creditors accepting the obligations of the debtors under the fresh promissory notes in substitution for the old debts and the interest due thereon, and in past years being content that the interest accruing in this manner, should be assessed to income tax. In these circumstances I am unable to hold that there were no materials before the Income tax Officer which would justify him in concluding that these sums, amounting in all to Rs. 23,373, represented interest liable to assessment in the year 1933-34.

The point which we wish to emphasise with regard to this decision is that it does not lay down that when a new pro-note is executed for the principal and interest due on a prior note, the interest is always assessable. Their Lordships accept the proposition that the general rule is that the giving of promissory notes does not amount to payment. The rule is laid down by the Privy Council in *Commissioner of Income Tax, Bihar and Orissa* v. *Kameshwar Singh* in these clear terms (*Vide* 1933 I.T.R. at p. 108) : 'A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor : he merely gives him a document or voucher of debt possessing certain legal attributes.' The creditor in such cases 'does not receive payment of any taxable income from his debtor or indeed any payment at all.'

Raghunandan Prasad v. *Commissioner of Income Tax, Bihar & Orissa* (1933 I.T.R. 114) is a still stronger case. A mortgage was executed for the principal and interest due on a prior debt. The grantors of the new mortgage were not identical with the

grantor of the original mortgagor and new properties were included. Still the Privy Council held [1933 I. T. R. at p. 119]: "The substitution effected cannot in any real sense be described as the equivalent of a realisation of the original mortgage, principal and interest. What happened was that the assessees received a new and substituted security for an existing debt. To give a security for a debt is not to pay a debt." It is important to note that even in the question framed by the Commissioner itself it was stated that the assessees had credited the principal and interest of this bond in their books of accounts. Their Lordships did not attach the least importance to this fact. When a transaction of this nature is effected, entries are usually made in the accounts and, as the Allahabad High Court has held, such entries are only made to show the financial state of the business.

The decision of the Rangoon High Court is based on the special facts of the case. We have already pointed out that the mercantile system of accounting gives rise to the interpretation that entries of credit amount to payments. Bankers will be well advised in eschewing this system altogether if they desire to avoid payment of income-tax on amounts which they have not received and may not perhaps receive at all. As PAGE, C. J., has so well observed:

"The remedy of the difficulty in which the assessees find themselves in the present case lies with the assessees themselves: for I see no reason why in the future they should not so adjust their accounts as to make it clear that the acceptance of a fresh promissory note is not taken as effecting payment of the interest due under the old loan."

The same rule applies to all entries relating to unrealised interest and we earnestly hope that our businessmen and accountants would take to heart this advise given by the learned Chief Justice and save themselves from a pit-fall into which we find they are falling almost every day.

Assessment of Estate of Deceased Persons.

It was decided by the Bombay High Court in *Commissioner of Income Tax* v. *Reid* [(1931) I. L. R. 55 Bom. 312] that where a person dies after the commencement of the financial year, but before his income has been assessed for the purpose of income-tax, his estate is not liable to pay the tax, as there was no provision in the Income Tax Act, 1922, as it then stood for assessing the estate in such cases. To remove this difficulty a new section, Section 24-B, was introduced by the Income Tax (second) Amendment

Act of 1933 which provided as follows: 'Where a person dies, his executor, administrator, or other legal representative shall be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge, the tax assessed as payable by such person or any tax which would have been payable by him under this Act if he had not died."

This Amendment Act was passed on September 11, 1933, and the question whether the new section could be applied in respect of the estate of persons who had died before the 11th September, 1933, was raised before the Bombay High Court in a recent case, *Commissioner of Income Tax, Bombay* v. *D. N. Mehta* (1935 I. T. R. 147). Their Lordships have answered this question in the negative on the ground that retrospective operation cannot be given to a statute unless the legislature has clearly expressed its intention to make the Act retrospective.

INCOME TAX IN RESPECT OF FOREIGN POSSESSIONS.

The *Law Journal* (of England) March 30, 1935, contains a learned article on income tax in respect of foreign possessions contributed by Mr. T. J. Sophian. The article is reprinted below :—

" An important judgment has been recently given by the Court of Appeal with regard to income tax on foreign possessions, *Kneen* v. *Martin*. It may be useful to consider the case together with another recent decision of the Court in *Hall* v. *Marians* (18 T. C. 148) since these cases do suggest means of avoiding the liability to tax in respect of such sources of income.

Income from " foreign possessions," is taxable under Case IV and Rules 1 and 2 of Case V of the Income Tax Act, 1918. These rules, however, differentiate to some extent between the various classes of foreign possessions. The word " possessions " in this connection has a very wide meaning, and it clearly includes " securities " on the one hand, which come under Case IV, and stocks, shares and rents on the other, which come under Rule 1 of Case V.

As LORD HERSCHELL stated in *Colquhoun* v. *Brooks* [(1889) 14 A. C. 493] :

(" Possessions ") seems to indicate an intention to cover......... something more than 'property'. And it is difficult to see why, unless the intention were to embrace something more, the latter word was not used. 'Possessions' is a wide expression; it is not a word with any technical meaning; the Act supplies no interpretation of it. I cannot see why it may not fitly be interpreted as

relating to all that is possessed in His Majesty's Dominions out of the United Kingdom or in foreign countries, and which is a source of income. And if so, I do not think any violence would be done to the language if it were held to include the interest which a person in this country possesses in a business carried on elsewhere."

Now, although "Securities and Stocks, shares and rents are possessions" they must nevertheless fall to be taxed under Case IV and Rule 1 of Case V respectively, and not under Rule 2 of Case V, within which all other kinds of foreign possessions are comprised.

It would appear that one of the essential conditions to render a person chargeable to tax in respect of foreign possessions is "residence". Furthermore, as in the case of foreign possessions falling within Rule 2 of Case V, for example, another essential condition for chargeability is the receipt of the sums in question here.

Kneen v. *Martin* would appear to add a further condition which is applicable to every case, *viz.*, that it is only the income from foreign possessions, and not the capital thereof that is taxable.

The proposition which the Crown put forward, though unsuccessfully, in the above case was that all sums received from abroad were chargeable to tax, irrespectively of whether or not such remittances were of income or of capital, though on the other hand, the amount of tax to be charged thereon was to be based on the actual amount of the income arising abroad, and not necessarily on the whole amount of the remittances received here.

The Court of Appeal, however, held that no tax was chargeable unless the remittance received here was a remittance of income. Whether a sum in question is to be regarded as income or as capital must largely be a question of fact, which however, in some cases may not be very easy to determine especially where the income has been invested and the sums remitted directly represent the proceeds of the sale of such investments. It should be noted however, that for tax purposes income does not necessarily cease to be income by reason of the fact that it has been invested, so that the proceeds of sale of such investments may nevertheless be treated as income. The suggestion, however, has been put forward in certain quarters that the income arising abroad from foreign possessions cannot be regarded as "income" for the purposes of tax unless it has arisen or accrued at a time when the person entitled thereto was resident here or was otherwise amenable to the tax laws of this country.

It is to be observed that the sums in question in that case represented in part the proceeds of sale of investments made out of income arising abroad at a time when the assessee was not resident in this country.

As already indicated, in certain circumstances, the receipt here of the income from a foreign possession is necessary in order to create a liability to tax. To constitute a " receipt " there must, as LORD LINDLEY stated in *Gresham Life Etc.* v. *Bishop* [1902 A. C. at p. 296] " be a person to receive, and a person from whom he receives, and something received by the former from the latter and in that case that something must be a sum of money—a mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth."

A receipt, therefore, may be either actual or constructive, *e.g.*, by the settlement of an account, although no money passes. Indeed, it would appear that anything which constitutes a receipt amongst businessmen would be regarded as constituting a receipt for this purpose.

The case of *Hall* v. *Marians* is of particular interest in this connection, since there, by a series of transactions the virtual benefit of the foreign income was enjoyed here without its receipt, on the other hand, in this country. The facts were briefly as follows: " A person had a share in a business carried on in Colombo and the income therefrom was paid into a bank in Colombo and there invested. The assessee, who was resident in this country obtained overdrafts from an English bank on the strength of these investments. Subsequently these overdrafts were transferred to the bank in Colombo, but for this purpose an entirely new and independent arrangement to which different conditions applied was entered into with the bank in Colombo."

Subsequently the bank in Colombo sold some of the investments held by them and thereby discharged their own overdrafts. It was held that no part of this foreign income had been received in this country, and that no liability to tax accordingly accrued.

This case, no doubt, may serve as a useful precedent for persons residing here, who may be desirous of enjoying here the benefit of their foreign income without thereby attracting tax there."

THE

INDIAN FINANCE ACT, 1935.

[Received the assent of the Governor-General under the provisions of Clause (*b*), sub-section (1) of Section 67-B of the Government of India Act on the 22nd April, 1935].

An Act to fix the duty on salt manufactured in, or imported by land into certain parts of British India, to vary certain duties leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, to fix rates of income tax and super-tax and to vary the excise duty on silver leviable under the Silver (Excise Duty) Act, 1930.

WHEREAS it is expedient to fix the duty on salt manufactured in or imported by land into certain parts of British India, to vary certain duties leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, to fix rates of income tax and super-tax, and vary the excise duty on silver leviable under the Silver (Excise Duty) Act, 1930; It is hereby enacted as follows:—

I. Short title and extent.

1. This Act may be called the INDIAN FINANCE ACT, 1935.

2. It extends to the whole of British India including British Baluchistan and the Sonthal Parganas.

II. Fixation of Salt duty.

The provisions of Section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Governor-General in Council to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India other than Burma or Aden, be construed as if for the year beginning on the 1st day of April 1935, they imposed such duty at the rate of one rupee and four annas per maund of eight-two and two-sevenths pounds avoirdupois of salt manufactured in or imported by land into, any such part and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule made under that section.

III. Amendments of the first and second Schedules to Act XXXII of 1934.

1. In the First Schedule to the Indian Tariff Act, 1934—

In Items Nos. 61 (2) and 62 (1) for the words "Five annas per ounce" in the fourth column the words "Two annas per ounce" shall be substituted.

2. In the second Schedule to the Indian Tariff Act, 1934, the heading "*Skins*" together with Item No. 3 under that heading shall be omitted.

IV. Inland postage rates.

For the year beginning on the 1st day of April, 1935, the Schedule contained in the first Schedule to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

V. Income tax and super-tax.

1. Income tax for the year beginning on the 1st day of April, 1935, shall be charged at the rates specified in Part I of the Second Schedule increased in each case, except in the case of total incomes of less than two thousand rupees falling under heading A in the said Part, by one-sixth of the amount of the rate.

2. The rates of super-tax for the year beginning on the 1st day of April, 1935, shall for the purposes of Section 55 of the Indian Income Tax Act, 1922, be those specified in Part II of the Second Schedule increased in each case by one-sixth of the amount of the rate.

3. For the purposes of the Second Schedule "total income" means total income as determined for the purposes of income tax or super-tax as the case may be, in accordance with the provisions of the Indian Income Tax Act, 1922.

4. For the purpose of assessing and collecting income tax on total incomes of less than two thousand rupees the Indian Income Tax Act, 1922, shall be deemed to be subject to the adaptations set out in Part III of the Second Schedule.

5. For the purpose of any assessment to be made for the year ending 31st March 1936, the rate of income tax applicable to such part of the total income of any person as is derived from

salaries or from interest on securities paid in the year ending 31st March 1935, shall be the previous year's rate and for the purposes of refunds under sub-Section (1) or sub-Section (3) of Section 48 in respect of dividends declared in the year ending 31st March, 1935, or of payments made in the said year of salaries or of interest on securities, the rate applicable to the total income of the person claiming refund shall be the previous year's rate.

Explanation.—In this sub-section the term "previous year's rate" with reference to any person means the rate of income-tax which would have been applicable to his total income if he had been assessed for the year ending 31st March, 1935, on a total income equal to that on which he is assessable for the year ending 31st March, 1936.

VI. Excise duty on silver.

In sub-Section (1) of Section 3 of the Silver (Excise Duty) Act, 1930, for the words "five annas" the words "two annas" shall be substituted.

SCHEDULE I.

Schedule to be inserted in the Indian Post Office Act, 1898.

[*See Section 4.*]

THE FIRST SCHEDULE

INLAND POSTAGE RATES.

[*See Section 7.*]

Letters.

For a weight not exceeding half a tola ...	One anna.
For a weight exceeding half a tola but not exceeding two and a half tolas ...	One anna and three pies.
For every two and a half tolas or fraction thereof, exceeding two and a half tolas ...	One anna and three pies.

Postcards.

Single ...	Nine pies.
Reply ...	One and a half annas.

Book, Pattern and Sample Packets.

For the first five tolas or fraction thereof ...	Nine pies.

For every additional five tolas or fraction thereof in excess of five tolas ... Six pies.

Registered Newspapers.

For a weight not exceeding eight tolas ... Quarter of an anna.

For a weight exceeding eight tolas and not exceeding twenty tolas ... Half an anna.

For every twenty tolas, or fraction thereof exceeding twenty tolas ... Half an anna.

Parcels.

For a weight not exceeding twenty tolas. Two annas.

For a weight exceeding twenty tolas and not exceeding forty tolas ... Four annas.

For every forty tolas or fraction thereof. exceeding forty tolas ... Four annas.

SCHEDULE II.

[*See Section 5.*]

PART I

Rate of Income Tax.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company ... Rate

(1) When the total income is Rs. 1,000 or upwards, but is less than Rs. 1,500 ... One and one-third pies in the rupee.

(2) When the total income is Rs. 1,500 or upwards but less than Rs. 2,000 ... Two and two-thirds pies in the rupee.

(3) When the total income is Rs. 2,000 or upwards but is less than Rs. 5,000 ... Six pies in the rupee.

(4) When the total income is Rs. 5,000 or upwards but is less than Rs. 10,000 ... Nine pies in the rupee.

(5) When the total income is Rs. 10,000 or upwards, but is less than Rs. 15,000 ... One anna in the rupee.

(6) When the total income is Rs. 15,000 or upwards, but is less than Rs. 20,000 ... One anna and four pies in the rupee.

(7) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000 ... One anna and seven pies in the rupee.

(8) When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000 ...	One anna and eleven pies in the rupee.
(9) When the total income is Rs. 40,000 or upwards, but is less than Rs. 1,00,000 ...	Two annas and one pie in the rupee.
(10) When the total income is Rs. 1,00,000 or upwards ...	Two annas and two pies in the rupee.
B.—In the case of every company and registered firm, whatever its total income ...	Two annas and two pies in the rupee.

PART II.

Rate of Super-Tax.

In respect of the excess over thirty-thousand rupees of total income—	Rate
(1) In the case of every company—	
(*a*) in respect of the first twenty thousand rupees of such excess ...	*Nil.*
(*b*) for every rupee of the remainder of such excess ...	One anna in the rupee.
(2) (*a*) in the case of every Hindu undivided family—	
(*i*) in respect of the first forty-five thousand rupees of such excess ...	*Nil.*
(*ii*) for every rupee of the next twenty-five thousand rupees of such excess ...	One anna and three pies in the rupee.
(*b*) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company—	
(*i*) for every rupee of the first twenty thousand rupees of such excess ...	Nine pies in the rupee.
(*ii*) for every rupee of the next fifty thousand rupees of such excess ...	One anna and three pies in the rupee.
(*c*) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(*i*) for every rupee of the next fifty thousand rupees of such excess ...	One anna and nine pies in the rupee.

(*ii*) for every rupee of the next fifty thousand rupees of such excess ...	Two annas and three pies in the rupee.
(*iii*) for every rupee of the next fifty thousand rupees of such excess ...	Two annas and nine pies in the rupee.
(*iv*) for every rupee of the next fifty thousand rupees of such excess ...	Three annas and three pies in the rupee.
(*v*) for every rupee of the next fifty thousand rupees of such excess ...	Three annas and nine pies in the rupee.
(*vi*) for every rupee of the next fifty thousand rupees of such excess ...	Four annas and three pies in the rupee.
(*vii*) for every rupee of the next fifty thousand rupees of such excess ...	Four annas and nine pies in the rupee.
(*viii*) for every rupee of the next fifty thousand rupees of such excess ...	Five annas and three pies in the rupee.
(*ix*) for every rupee of the next fifty thousand rupees of such excess ...	Five annas and nine pies in the rupee.
(*x*) for every rupee of the remainder of such excess ...	Six annas and three pies in the rupee.

PART III.

Adaptations of the Indian Income-Tax Act, 1922, to provide for the summary assessments of income-tax on total incomes of less than Rs. 2,000.

1. The Income Tax Officer may, save where he has served a notice under sub-section (2) of Section 22 of the Indian Income Tax Act, 1922, make a summary assessment of the income of an assessee to the best of his judgment, and shall serve on the assessee a notice of demand in a form to be prescribed by the Central Board of Revenue and such notice shall be deemed to be a notice of demand under Section 29 of that Act.

2. Any assessee in respect of whom such summary assessment has been made, may, within thirty days of receipt of the notice of demand make an application to the Income Tax Officer for the cancellation or revision of the assessment and the Income Tax Officer shall after examining any accounts and documents and hearing any evidence which the assessee may produce and such other evidence as the Income Tax Officer may require, determine by order in writing, the amount of the tax, if any, payable by the assessee, and such determination shall be final :

Provided that if any assessee making such application files therewith a return of his income under sub-section (2) of Section 22 of the Indian Income Tax Act, 1922, the application shall be deemed to be a return under that sub-section and shall be dealt with accordingly.

3. A copy of an order under paragraph 2 shall be served on the assessee to whom it relates and shall be deemed to be a notice of demand under Section 29 of the Indian Income Tax Act, 1922.

4. The above procedure shall apply also to the assessment and collection during the financial year 1935-36 of incomes of Rs. 1,000 and upward and less than Rs. 2,000 which have escaped assessment in the financial year 1934-35.

NOTES AND COMMENTS.

Distribution of Accumulated Profits as Debentures.

The principle laid down by the House of Lords in *Blott's Case* and followed by the House in *Fischer's Case* (1926 A.C. 395), that where a company capitalises its accumulated profits and distributes them as debentures to the shareholders there is no distribution of profit and the shareholders cannot be assessed to income tax in respect of the value of the debentures, was applied by the Calcutta High Court in *In the matter of the Estate of Sir David Yule* (reported *infra*). In this case the trustees of the estate of Sir David Yule who left assets in India, mostly shares in companies, of the value of £ 10,000,000 had to meet heavy outgoings for duties and successfully raised funds without rendering themselves liable to pay income tax by following the procedure adopted in *Fisher's Case*, namely, by capitalising the accumulated profits and distributing them as debentures and then redeeming the debentures. There is some difficulty where there are other shareholders. But the trustees in this case got over this difficulty also by issuing a certain number of preferential shares to themselves and issuing debentures to preferential shares alone. No doubt the income-tax authorities may think they have been over-reached, but as pointed out by BEAUMONT, C. J., in *In re Bai Sakinaboo* (34 Bom. L. R. 100) there is nothing wrong in so conducting one's affairs within the law as not to attract taxation, and if any of His Majesty's subjects are clever enough to avoid taxation by legal means they are at liberty to do so.

Indian case law is also to the same effect. Reference may be made, for instance, to *Commissioner of Income Tax, Madras* v. *Binny & Co.* (I.L.R. 47 Mad. 837) and *Steel Bros. and Co., Ltd.* v. *Government* (I.L.R. 2 Rang. 211). The present case differs from the other cases only in that the devise was adopted to evade income tax.

Piecemeal References.

The concluding portion of the judgment of SIR PHILIP LINDSAY BUCKLAND, J., in *Sir David Yule's Case* contains some important observations relating to references under Section 66, Income Tax Act. In this case the Advocate-General urged on behalf of the Crown as a last resort that the capitalisation of undivided profits and distribution of the profits as debentures to preference shares alone was *ultra vires* the companies' memorandum and articles and that the transactions were not therefore binding on the revenue authorities. His Lordship said that the case stated proceeded throughout upon the footing that the transactions were not bad and that it was not therefore open to the Crown so to contend before the High Court upon the case stated by the Commissioner. If such points are to be submitted for the decision of the High Court they should have been formulated in the case stated, with all necessary findings of fact and the Commissioner's opinion. His Lordship added that, if the explanation of the omission was that the Commissioner had not availed himself of the legal resources of the Crown which were at his disposal his Lordship could only say that the result was unfortunate. The High Court would not for that reason allow the Advocate-General to raise the new points which he sought to raise.

The Advocate-General then suggested that, as the appeal before the Assistant Commissioner had not been finally disposed of, it was open to the Assistant Commissioner in determining the appeal, to come to findings of fact adverse to the assessee and that from the order of the Assistant Commissioner an appeal would then lie to the Commissioner whereupon a reference could be made. With regard to this argument the learned Judge said that if it were so, that was only an additional reason for declining to entertain points of law which had not been even remotely suggested at the earlier stages. His Lordship condemned such procedure in these words:

" The multiplicity of proceedings which the learned Advocate-General adumbrates cannot be sufficiently deprecated. The

competency of the Commissioner to make a reference under Section 66 (1) at the stage at which this reference has been made cannot be questioned, but unless such reference will result in finality at least as regards the assessment for the year for which the assessment has been made, it would be better deferred until all relevant facts have been ascertained and the case then stated by the Commissioner with such legal assistance as he may deem necessary in a a manner setting out all material findings of fact and the several questions of law arising therefrom upon which the opinion of the Court is sought."

Nature of the Jurisdiction of the High Court in Income Tax References and Procedure Applicable to Appeals to Privy Council.

In the matter of application for leave to appeal to the Privy Council against the judgment of the Calcutta High Court in the case of the *Hungerford Investment Trust Ltd.* (1935 I.T.R. 65) an important point relating to the procedure arose for decision, namely, whether an application for leave to appeal to the Privy Council against a judgment made in an Income Tax Reference was governed by Chapter XXXIII of the Rules and Orders of the Calcutta High Court (relating to matters arising in the Original Civil Jurisdiction of the High Court) or by the Rules of the Civil Procedure Code. As their Lordships observed, the point raised is of great importance as it has been assumed till now that the practice on petitions for leave to appeal to the Privy Council in income tax matters was governed by Chapter XXXIII and the practice has been followed for many years. After discussing the relevant provisions of the Income Tax Act, the Civil Procedure Code and the High Court Rules, their Lordships have come to the conclusion that the jurisdiction conferred on the High Court by Section 66 of the Indian Income Tax Act is a special jurisdiction and forms no part of the High Court's original or appellate jurisdiction. The rules contained in Chapter XXXIII in so far as they were inconsistent with or altered the provisions of Order 45 of the Civil Procedure Code apply only to matters arising in the exercise of original civil jurisdiction and have therefore, no application to Income Tax Appeals. These are solely governed by the provisions of the Civil Procedure Code. We await the opinion of the Judicial Committee on this important question of procedure.

Partnership between Hindu Undivided Family and Firm.

It has been decided that a firm cannot be a partner in another firm and that an association consisting of two firms cannot

be treated as a firm for the purposes of income-tax : (See *Jai Dayal Madan Gopal, In re* (1933 I.T.R. 186). In a recent case before the Allahabad High Court, *Prabhu Lal Pearey Lal* v. *Income-Tax Commissioner, U. P.* (Misc. C. No. 384 of 1933 : to be reported), it was contended that the principle of the abovesaid decision is confined to registered firms and is not applicable to a partnership between an undivided Hindu family and a firm. The High Court has, overruling this contention, held that the said ruling does not draw any distinction between registered firms and other firms and that for purposes of assessment to income tax no partnership can be constituted between a joint Hindu family and a firm. The assessment of fims presents numerous difficulties in practice which may have to be settled by the High Courts in due course.

THE SCOPE OF SECTION 34, INDIAN INCOME TAX ACT.

Section 34 of the Indian Income Tax Act has been the subject of interpretation in several cases decided by the High Courts in India and different views have been expressed. In the recent decision of the Lahore High Court in *Amir Singh Sher Singh* v. *Commissioner of Income Tax, Punjab*, (reported *infra* at p. 171) there is an elaborate discussion of the scope of this section. It has been held, on the one hand, that the section is confined to cases where the taxing authority has failed to tax income owing to accidental or deliberate omission by the assessee to declare it or to similar circumstances and that it does not include cases where the income is known or disclosed to the income tax authority and has been the subject of assessment but has not been assessed owing to some mistake in procedure or by the income being treated in a wrong category. The second view is that the section covers all cases of non-assessment whether it be due to inadvertence or to error of judgment or wrong application of the Act. A third view can also be suggested namely, that it gives unrestricted power to revise prior orders whenever it is found that a higher tax could be levied on income which has once been assessed. The Lahore High Court has, in the present case, disagreed with the first view and held that there is no justification for confining the meaning of the word 'escape' in Section 34 of the Income Tax Act to cases which have not come to the notice of the Income Tax Officer at all, that the section is wide enough to include any case of non-assessment, to whatever cause it may be due, and that

the section empowers an Income Tax Officer to assess income which has not been assessed by his predecessor on account of a wrong application of the Act. In taking this view their Lordships have disagreed with an earlier decision of the same High Court in *Dewan Kishen Kishore* v. *Commissioner of Income Tax, Punjab* (14 Lah. 255 ; 1933 I.T.R. 143) and followed the decision in *In re The Anglo Persian Oil Co. Ltd.* (I.L.R. 60 Cal. 940) which, in its turn, was based on *Commissioner of Income Tax, Madras* v. *Raja of Parlakimedi* (I.L.R. 49 Mad. 22).

While commenting upon *Dewan Kishen Kishore's Case*, we have already expressed our opinion that the view taken in that case is too narrow and that the opinion expressed in the Madras and Calcutta cases was the better one. We said (*vide* 1933 I.T.R. Notes and Comments, page 20) :

"In view of the fact that the learned counsel for the appellant made no serious attempt to justify the action of the Income Tax Officer in proceeding under Section 34 in the *Lahore Case*, this case is not of much authority and we have to be guided by the Madras and Calcutta cases referred to above."

We are glad to find that the Lahore High Court has disagreed with its earlier view and adopted the view laid down in the Madras and Calcutta cases.

A very recent decision of the King's Bench Division on Section 125 of the English Income Tax Act (which corresponds to Section 34 of the Indian Act) considerably supports this view. There the Inspector of Taxes accepted the contention of the assessee that a certain source of income was not taxable. Some years later the Inspector reconsidered the facts and came to the conclusion that the income was taxable. It was contended on behalf of the assessee that there was no discovery of any new facts but only a mistake of law and that the income could not therefore be reassessed. This contention was rejected by FINLAY, J., and the additional assessment was upheld. (This case, *Williams* v. *Grundy*, is fully reported in Vol- II of the *Income Tax Reports* at page 236).

The judgment of the Lahore High Court is, however, open to the serious misconstruction that their Lordships are of opinion that Section 34 empowers an Income Tax Officer to revise a previous order of assessment whenever he thinks that that assessment was too low ; in other words, that Section 34 is capable of the third

construction mentioned above. This view is certainly untenable and the decision of the Rangoon High Court in *Commissioner of Income Tax, Burma* v. *U. Lu Nyo* (I.L.R. 12 Rang. 118 ; 1933 I.T.R. 373) which the Judges of the Lahore High Court seem to doubt, is in our opinion entirely correct. There is a distinction between cases where income has escaped assessment within the meaning of Section 34 and cases where an Income Tax Officer merely disagrees with his predecessor as to the amount of the assessable income and seeks to go behind and revise the assessment made by his predecessor. Their Lordships seem to think that the decision in *U Lu Nyo's case* is inconsistent with the decision of the Special Bench of the Rangoon High Court in *Commissioner of Income Tax, Burma* v. *N. N. Burjorjee* (I.L.R. 9 Rang. 16). They are not inconsistent. Both lay down good law.

NOTES AND COMMENTS.

Assessment of Profits Paid to Partners on Dissolution: A Privy Council Ruling.

Our readers may remember the case of *Commissioner of Income Tax, Madras* v. *P. R. A. L. M. Muthukaruppan Chettiar* (1934, 2 I.T.R. 406) in which a Special Bench of the Madras High Court (Sir OWEN COMPTON BEASLEY, C.J., Sir V. RAMESAM, J., and SUNDARAM CHETTI, J.) decided that on the dissolution of a firm the capital, interest and profits due to the partners become consolidated into capital and that the share of the capital and profits and interest received by a retiring partner was therefore a receipt of capital and not income and no portion of it was liable to be assessed to income tax. Their Lordships applied to the case of dissolution of partnership the principle laid down in *Burrell's Case* (9 Tax Cas. 27) in regard to the winding up of limited companies.

The above decision appeared to us to be unsound and in our *Notes and Comments* (*vide* 2 I.T.R., Notes and Comments, p. 57, October issue of 1934) we stated that there was no sufficient justification in principle or authority for extending to ordinary partnerships, the rule of capitalisation of undistributed profits which is applied to limited companies that are being wound up. We pointed out that in the case of a limited company no shareholder is entitled to treat any income as profits until the company has declared it as such, and that the commencement of liquidation puts an end to the power of the company to declare undistributed profits, and said: "the only thing that the liquidator has to do is to turn the assets into money and divide the money among the shareholders in proportion to their share. Dissolution of a partnership stands on an essentially different footing. None of these considerations apply. Accounts up to the date of the liquidation are taken, the capital invested by each partner and interest thereon are calculated, each partner's share in the profits is ascertained, and each is paid his share of the capital and interest; and the share of the profits is paid to him as such. It is difficult to see how the share of the profits so paid out to him can be exempt from income tax."

We are extremely gratified to find that the Privy Council have reversed the judgment of the Madras High Court exactly

on the grounds that we had suggested. Their Lordships also observe that the receipt by a shareholder of his share of the assets of the company on a winding up stands entirely on a different footing. They refer to the fact "that a company is a separate entity to the shareholders; that during the continuance of the company the latter have no right to the profits except so far as they are distributed on a regular declaration of a dividend, and that on winding up their sole right is to share in the assets available after winding up and that for the purpose of ascertaining such assets it is quite immaterial whether the company originally possessed them by way of capital or profits.........What the liquidator distributes is a lump sum and no reconstruction into a division of capital or profit is necessary or in many cases possible. The position in respect of the partnership is different. The profits are the profits of the partners representing an interest of each partner and as soon as declared, constituting an obligation from the firm to each partner......The account taken on dissolution ascertains what is due to the partners for profits and what is due for capital......In other words, on the dissolution of partnership an outgoing partner has the right to receive not as in the case of a shareholder in winding up a company only a share of the assets but to receive payment of his profits, profits which were his before dissolution and do not cease to be his on dissolution."

Before leaving this decision it is important, as their Lordships have done, to point out that their Lordships' decision does not cover cases where undrawn profits have, with the consent of all parties, been invested in the business so as to increase the capital account. Nor had they to consider any special provisions of Partnership articles affecting the matter. If partners do not wish to withdraw their profits they may perhaps be well advised in leaving their profits in the business with the consent of all the parties so as to increase the capital account, as suggested by their Lordships. Care must be taken in such cases to effect the transaction in such a way that there may be no scope for any contention on the part of the income tax authorities that there was in fact a withdrawal of profits and a re-investment in the business.

Difference between 'Income' and Receipt of Capital in Instalments: Tikari Raj Case.

Another important judgment was pronounced by the Judicial Committee on May 28, in the case of *Maharajkumar Gopal*

Saran Narain Singh v. *Commissioner of Income Tax, Bihar and Orissa* (to be reported in the next issue). This was an appeal from the Judgment reported in Vol. II of the *Income Tax Reports* at page 264. The facts of the case were that the owner of an estate who had contracted debts transferred it to one of his relatives for the purpose of discharging his debts and for securing to himself an adequate income for his life, and the consideration for the transfer, accordingly, was payment (i) of the assessee's debts (ii) of some amount in cash and (iii) of a certain sum of money annually for the life of the assessee. The question was whether the annuity thus received by the assessee was a receipt of a capital sum in instalments or income within the true meaning of that word. The Chief Justice of the Patna High Court and VARMA, J., took the view that it was income and not capital. NOOR, J., held otherwise. The Privy Council agreed with the view of the Chief Justice and VARMA, J. Considering the special circumstances of this case, namely, that the express object of the assessee in making the transfer was to secure an adequate income for his life, that the property was not valued and the consideration bore no relation to the actual value of the property but depended on the duration of the assessee's life, the decision could not have been otherwise.

In our comment upon this case (*vide* 1934, 2 I.T.R. Notes pp. 39 and 40) we said that the view taken by the Chief Justice and VARMA, J., was the correct one and we are glad to find that the Privy Council have also come to the same conclusion.

'Income' does not Necessarily mean Profit or Gain.

Apart from the actual decision itself, the observations their Lordships have made in the *Tikari Raj Case* on the true meaning of the word 'income' are of very geat importance. It was argued in this case that the words 'income, profits and gains' in Section 12 (1) of the Income Tax Act must be construed as including only such income as constitutes or provides a profit or gain to the recepient. In other words, that the word 'income' is in some way limited by its association with the words 'profits and gains.'

Their Lordships refused to accept this contention and said that 'income' is not limited by the words 'profits and gains.' Anything which can be properly described as income is taxable under the Act, unless expressly exempted. In order that income may be taxable it is not necessary that it should constitute or provide a profit or gain to the assessee. Their Lordships have re-iterated that the true definition of income is that stated by the Board in

Shaw Wallace's Case, i.e., periodical monetary return coming in with some sort of regularity from definite sources.

Assessment of Unrealised Interest: Another Ruling.

We have one more important ruling of the Rangoon High Court in *Commissioner of Income Tax, Burma* v. *M.A.L. Chettiyar Firm* (reported *infra* at p. 193). So far as the decision itself goes on the facts of the case, we have nothing to say, for the question in effect was whether there were materials before the income tax officer to find on the facts that a particular sum of interest had accrued during the accounting year, and, as their Lordships have observed with emphasis at the commencement of the judgment, the High Court was not concerned with the question whether the decision on the facts was right or wrong but only whether there were materials on which the Income Tax Officer could have arrived at the conclusion that he had reached.

But on the general effect of taking a promissory note for interest due there are some observations which are unsound. There can be no doubt that the mere execution of a promissory note for interest which has become due does not amount to a discharge of the interest and re-investment of the same as capital. We may refer to the following emphatic and most authoritative statement of the law made by Lord Macmillan in the *Dharbhanga Case* [1933 I.T.R. 94 at p. 108] :—

"A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor ; he merely gives him a document or voucher of debt possessing certain legal attributes."

It is a matter for great regret that upon an important and settled matter like this the counsel who appeared for the assessee in *M.A.L. Chettiyar's Case* should have committed the great blunder of conceding that "The old loan had been discharged by the acceptance of the new promissory note." [See third para. of 1935, 3 I.T.R. p. 195 *infra*].

A Word of Advice to Money-lenders.

It appears from the judgment in the above-mentioned case that while Chettiyars generally adopt the cash system with regard to non-Chettiyar debtors, where a fresh note is taken for interest due from a debtor they adopt the mercantile system of accounting. It is difficult to follow the Chief Justice's conclusion which assumes that they suddenly change the system for particular entries. The true

conclusion is that the system remains cash system throughout and that the entries as to receipt of interest are made in such a case simply for knowing the financial state of the assessee's business as held clearly and, in our opinion, correctly by the Allahabad High Court in *Sahu Jagamandar Das's Case* (1935, 3 I.T.R. 140). We think, with all respect to the Chief Justice, that it is erroneous to say that in such cases the "assessees are investing the old interest as capital in the new loan." There is no payment; no new loan; no investment. The assessees only take a document or voucher for debt due to them, as Lord Macmillan has said, which in many cases is due to the fact that the debtor is unable to pay, and make corresponding entries in the accounts.

Anyhow, we wonder why Chettiyars and other money-lenders should make such credit entries of interest before realising the interest. Such entries are the cause of the whole trouble.

Mercantile System and Cash System Compared.

Before leaving this case we wish to refer to the observation made by the Chief Justice in this case that 'the mercantile system probably works out as satisfactorily to the assessees and the income tax authorities as does the method of accounting known as the cash system.'

This is perhaps true if everything goes on well. But, as we have stated on a former occasion, in many cases the debtor may become embarrassed and the debt may not be recovered at all, and when interest accumulates a great portion may have to be given up when accounts are settled. Is it wise to pay income tax for all these unrealised amounts first and then plead for allowance for bad debts especially, when, according to the law as it at present stands, it rests with the income-tax people to decide whether and when a debt has become bad? Further, the assessee may find himself within the super-tax limits in some years if he adopts the mercantile system and is assessed also on income not really received.

Returns Signed by Agents: Duty of Income Tax Officers.

Income tax returns are sometimes filed by agents of the assessees and the Oudh Chief Court has in the case of *Raja Saiyed Mahomad Mehdi* (reported *infra*) made some pronouncements with regard to such returns and the duties of Income Tax Officers in relation thereto. In this case the return which was signed and verified by a *muktiar-i-am* of the assessee concealed certains items of income and when proceedings for levying a penalty on the assessee were initiated, the assessee contended that the agent had

no power to submit the return on his behalf and that it was not therefore binding upon him. The power of attorney was a power to file applications and written statements in Courts and Government Departments. The learned Judges held that though the Income Tax Department was a Government Department the return was neither an application nor a written statement and that it was not therefore binding on the assessee. The learned Judges further observed in this connection that,

'It is the duty of Income Tax Officers before they accept returns signed and verified by agents to satisfy themselves about the authority of such agents to do so.'

The general question whether under the Income Tax Act a return of income required to be filed under Section 22 (2) must be signed and verified by the assessee himself or can be signed and verified by an agent was raised during the argument in this case. The learned Judges, however, expressly left the question undecided as it was not necessary for the decision of the case.

Page, C. J., on the Proper Mode of Serving Notices.

The Judgment of a Special Bench of the Rangoon High Court (PAGE, C.J., MOSELY, J., and BA U, J.) in *Commissioner of Income Tax, Burma* v. *Dey Brothers* (reported *infra*) is of special importance to Income Tax Officers as it contains some important pronouncements with regard to the proper mode of serving notices under the Income Tax Act. Irregularity in the service of notice leads to unnecessary multiplicity and protraction of proceedings and should, of course, be avoided as far as possible.

Before dealing with what is due service of notice the learned Chief Justice (Sir Arthur Page) refers to the view which is often entertained (and which the learned Commissioner expressed in this case) that so long as it is found that the notice has in some way or other reached the person upon whom it was to be served, there is a sufficient compliance with the provisions as to service. His Lordship said that such a contention is not in accordance with the provisions of the Act. Section 63 (1) of the Act prescribes that a notice or requisition under the Act may be served either by post or as if it were a summons issued by a Court under the Code of Civil Procedure, 1908; and this section must be complied with.

The contention that the person upon whom a notice was served had accepted other notices is also very often urged as a ground for holding that service on him is a valid service. In this case further the evidence showed that the clerks used to accept

communications addressed to the firm and that according to the practice obtaining in the business the employees were expected to hand over any communications which they had received to the manager, and these circumstances, it was argued, were sufficient evidence for coming to the conclusion that the manager was duly served. With regard to this argument his Lordship said:

"I have no doubt that it is not; for if we were to hold that it was, it would follow that merely because a process server happens to hand over a notice to a *durwan* or it might be to a *chaprassi*, that would be evidence that the person under whom the *durwan* or the *chaprassi* was serving had received the notice himself. In my opinion an inference to that effect could not be founded on such evidence."

In this connection we may also refer to the similar observations made by the learned Judicial Commissioners of the Central Provinces in *Commissioner of Income Tax, C.P.* v. *Baxiram Rodmal* [1934, 2 I.T.R. 438]. There also it was held that the mere fact that a person had accepted notices on behalf of the assessee on previous occasions and appeared for the assessee would not constitute him an agent on whom a notice or requisition under the Act could be validly served.

The learned Judges added that 'Income Tax Officers in doing the very important work of assessing income tax must take the elementary precaution of seeing that the person with whom they are dealing is in fact authorised to represent the assessee.'

Bad Debt: High Court's Power to Consider Whether Decision of Income Tax Authorities is Based on Relevant Evidence.

A question of some practical importance relating to bad debts was decided recently by the Lahore High Court in *Hukum Chand Jagadharmal* v. *Commissioner of Income-tax, Punjab* (reported *infra*). The Privy Council decided in the *Commissioner of Income Tax, Central and United Provinces* v. *Sir M. Chitnavis* [1932 Comp. Cas. 464; 59 I.A. 290] that 'whether a debt is a bad debt and if so at what point of time it became bad are questions of fact to be decided in the event of dispute by the appropriate tribunal and not by the *ipse dixit* of any one else.' Unfortunately, in India there is no appropriate tribunal to decide such questions except the income tax authorities themselves and the decision has placed the assessees to a great extent at the mercy of the income tax authorities. The judgment of the Lahore High Court in the above-mentioned case shows that the

matter does not rest entirely with the income tax authorities, for, as their Lordships have pointed out in this case, the conclusions of the income tax authorities must be based on relevant and admissible evidence and the question whether there is such evidence to support the conclusions arrived at by the income tax authorities is a question of law to be decided by the High Court.

Bad Debt : Necessity of Paying Due Regard to Creditor's Discretion.

Before leaving this topic we feel constrained to add that the questions whether a debt is bad and when it became bad are extremely difficult questions to decide, for these are matters depending more upon individual opinion than upon definite tangible facts. No one can predicate the exact point of time when a debt becomes bad. It is impossible for any businessman to calculate the financial position of a debtor day by day and hour by hour and to write off a bad debt at the exact point of time when it becomes irrecoverable. The proper course would be to leave the matter, not to the *ipse dixit* of the Income-tax Officer or to make him sole arbiter in the matter but to leave it to the discretion of the creditor and to abide by his resolution unless there are reasons to show that his decision is arbitrary or capricious. No doubt the Privy Council has held that these are questions of fact to be decided by the tribunal in the event of dispute and do not depend on the *ipse dixit* of any one. This decision does not show that in deciding the question whether a debt has become bad, due regard and weight should not be given to the *bona fide* discretion of the creditor. If it does, this aspect of the question must be advanced before the Privy Council and a definite ruling obtained as to the due weight that is to be attached to a *bona fide* resolution arrived at by the creditor.

In the present case, for instance, the Income Tax Officer found that the debt had become irrecoverable long before the year of account. The Assistant Commissioner found that the claim was premature as the debt had not become irrecoverable at all. The Commissioner agreed with the Income Tax Officer. The High Court disagreed with the Commissioner. We have come across several cases where such inconsistent decisions are arrived at. The truth of the matter appears to be that the question is not one depending entirely on tangible facts but to a great extent on opinion and the opinion of the creditor should be abided by, unless it is arbitrary.

NOTES AND COMMENTS.

The House of Lords on 'Income' and 'Capital': Van Den Bergh's Case.

In the next issue will be found a report of the judgments delivered on April 8, 1935, in the House of Lords in *Van Den Bergh Ltd.* v. *Clark (H. M. Inspector of Taxes).* The leading judgment in this case which was delivered by LORD MACMILLAN is so brilliant and learned that it will always be read with delight and advantage by all who are interested in the law of income tax.

'Income' and 'Capital'.

With reference to the difficult task of distinguishing 'income' from 'capital' his Lordship has observed as follows :—

"The problem of discriminating between an income receipt and a capital receipt and between income disbursement and capital disbursement is one which in recent years has frequently engaged your Lordships' attention. In general the distinction is well recognised and easily applied, but from time to time cases arise where the item lies on the border-line and the task of assigning it to income or to capital becomes one of much refinement as the decisions show. The Income Tax Acts nowhere define income, any more than they define 'capital'; they describe sources of income and prescribe methods of computing income, but what constitutes income they discreetly refrain from saying. Nor do they define 'profits or gains'; while as for 'trade', the 'interpretation' section of the 1918 Act only informs us, with a fine disregard of logic that it 'includes every trade, manufacture, adventure or concern in the nature of trade.' Consequently it is to the decided cases that one must go in search of light. While each case is found to turn upon its own facts, and no infalliable criterion emerges, nevertheless the decisions are useful as illustrations and as affording indications of the kind of considerations which may relevantly be borne in mind in approaching the problem."

Reported Cases.

"The reported cases", his Lordship continues, "fall into two categories, those in which the subject is found claiming that an

*[Cf. The definition of 'business' in the Indian Income Tax Act runs as follows: 'Business' includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. See Section 2 (4)—Ed.]

item of receipt ought not to be included in computing his profits and those in which the subject is found claiming that an item of disbursement ought to be included among the admissible deduction in computing his profit. In the former case the Crown is found maintaining that the item is an item of income and, in the latter case that it is a capital asset."

Lord Cave's view.

After referring to the leading modern authority on the subject, *British Insulated and Helsby Cables Ltd.* v *Atherton* [1926 A.C. 205] and the view which LORD CAVE recommended the House to adopt in that case, namely, that when an expenditure is made not only once and for all but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital, and to the observations made by ROMER, L.J. and LORD ATKINSON in further elucidation of this principle, LORD MACMILLAN says:

'If the numerous decisions are examined and classified they will be found to exhibit a satisfactory measure of consistency with LORD CAVE's principle of discrimination.'

The decision.

Apart from this learned discussion of the proper method of approaching the question and of the consideration that have to be borne in mind in discriminating income from capital, the actual decision in *Van Den Bergh's* case is also very instructive. The appellan's and a Dutch Company were keen competitors in manufacturing and dealing in margarine. In order to end the competition they entered into an agreement by which they bound themselves to work in alliance and to share their profits and losses in accordance with a certain scheme. The agreement was to be in force till 1940. In 1927 the appellants agreed to terminate the agreement in consideration of a payment of £ 450,000 to them. The Special Commissioners held that the receipt of £ 450,000 was an income receipt. FINLAY, J., held that it was capital receipt. The Court of Appeal restored the decision of the Commissioners, but the House of Lords agreed with FINLAY, J., and held that the £450,000 was not an item of profit arising to the appellants from the carrying on of their trade as the agreements which were cancelled were not ordinary commercial contracts made in the course of trading or

mere agreements as to how the profits should be shared but regulated the whole conduct of the business. Money received for the cancellation of so fundamental an organisation of a trader's activities cannot be regarded as an income receipt. The congeries of rights which the appellants enjoyed under the agreement and which they surrendered for a price was a capital asset. The agreement formed the fixed framework within which the circulating capital operated. They were not incidental to the profit making machine but were essential parts of the mechanism itself. They provided the means of making profits but they themselves did not yield profits.

'Sums Received As a Member of a Hindu Undivided Family.'

Maharani Lakshmibati Saheba's Case.

The expression 'sums received as a member of a Hindu undivided family' in Section 14 (1) of the Income Tax Act has been the subject of interpretation in some recent decisions of the Patna High Court. In *Commissioner of Income-Tax, Bihar and Orissa* v. *Maharani Lakshmibati Saheba* [(1935) 3 I. T. R. 49] it was said that the sums received as a member of a Hindu undivided family. would not be exempt from income tax unless the recipient shows that he had 'a vested right in the property or income of the family'. In their Lordships' opinion Section 14(1) merely relieved the assessee from showing that the sum in respect of which he claims exemption has already been taxed in the hands of the family. It did not relieve him from the necessity of showing that the sum received was a part of the income or property in which he had a vested right as a member of a Hindu undivided family.

We had stated in our *Notes and Comments* (1935 I. T. R. at p. 8) that the proposition laid down in this case, that the recipient must show that he had a vested right in the income or property of the family, is not quite accurate and is liable to be misconstrued.

Maharaja Visweshwar Singh's Case.

In a very recent case reported in our June issue, *Commissioner of Income Tax, Bihar and Orissa* v. *Maharaja Visweshwar Singh* (1935, 3 I. T. R. 216) their Lordships have again adverted to this subject and referred with approval to what they had stated in *Maharani Lakshmibati Saheba's Case.* The test laid down in *Maharaja Visweshwar Singh's Case* is, however, quite different. The learned Judges have omitted—we think rightly—the words 'a vested right in the income or property', and the condition which their Lordships now lay down is 'that the sum must have been paid out

of the joint family income.' Once the words 'vested right in the income or property' are removed there is not much which could be taken exception to. But even the test as laid down in *Visweshwar Singh's Case* is not still quite accurate. We have to go down a little further. The question, in our opinion, is not whether the sum was paid out of the joint family income or not. The assessee is not concerned with this. The real question is did he receive it *as* a member of the family, *i.e.*, by virtue of any right which he has, or his status, as a member of a Hindu family. He need not have any vested right in the income or property of the family. Nor is he concerned with the question whether the sum was paid by the karta out of the jointly family income. He is bound to show only that he received the sum by virtue of his right or status as a member of the family. Even if the joint family has no income at all for a year and the karta pays maintenance allowance to a widow by borrowing or begging the sum received by her would be exempt.

Burden of Proof.

We think the learned Judges have gone too far in the abovesaid case in laying down that a member must prove that the sum was paid to him *out of the joint family income* before he can claim exemption. To the argument that it is very difficult in practice to prove the source from which the payment is made, the Judges suggest that the manager should be called as a witness with his accounts and so on. We do not think the section contemplates proof of any such thing as a condition precedent for claiming exemption. As we have said, the only burden on the assessee is to show that he received it 'as a member of a Hindu undivided family,' *i.e., by virtue of a right which he has by law as a member of a Hindu family, or by virtue of his status as a member*: and there his burden ends. He need not prove further that he had any vested right in the income or property or that he was paid out of the joint family income.

The learned Judges have suggested some examples (at p. 221 of 1935 I. T. R.) to show that any other interpretation than that put by them would be wrong: (*i*) X, feeling to be under an obligation to a family makes an allowance to a member of the family who is in distressed circumstances: (*ii*) The Karta of an impoverished family makes allowances to members out of his self acquisitions.

These, in our opinion, are not cases of sums received by virtue of any right which the recipients have as members of the family. They are not sums received *as members*, but sums received as charity though *by members* of a family. The word 'as' is very significant and implies 'by virtue of his right or status as'.

Presumption As to Remittances From Foreign Possessions.

There is a current notion, especially in the Madras Presidency, that if an assessee's foreign business remits money to him in a country in which the profits from his business in that country are assessable to income tax, the presumption is that the remittance is a remittance from out of the profits of the foreign business and that the burden of proof is on the assessee to show the contrary.

The Rangoon High Court has in *V.P.R.P.L. Chettiar Family* v. *Commissioner of Income-tax, Burma* [(1933) 1 I.T.R. 319; 11 Rang. 397] considered the question in great detail and come to the conclusion that there is no such presumption at all, and that in every case when the question is whether a particular sum is profit or capital the question is a question of fact to be determined upon the material before the income tax authorities.

The opinion which LORD JUSTICE SLESSER has expressed in a recent case which was decided by the English Court of Appeal *Kneen (Inspector of Taxes)* v. *Martin* [1935, 104 L.J. K.B. 301) to be reported also in the *Income-tax Reports* is to the same effect. As the matter is of vital importance to the persons who carry on business in India and also in foreign places we are quoting *in extenso* the relevant passages from the judgment of SLESSER, L.J.:—

"The Attorney-General has pressed upon us the consideration that the Commissioners have said that they 'considered that, in the absence of evidence to the contrary, there is a presumption that to the extent to which there is income arising in any country, remittances received from that country are income and within the charge to tax, but that such presumption may be rebutted.' The learned Attorney-General argues that there is no such presumption. He points out that it is not a presumption merely of business practice, such as was mentioned in the case to which I have referred, but that, as a matter of presumption, as the language is there used by the Commissioners, if there be any presumption at all it is in favour of the subject, and that the Crown have to prove that they are entitled to exact the tax. I am inclined to agree with him that there is no such presumption

arising one way or the other......I express no final opinion, but I would guard myself against it being thought that there is, as I see it, as expressed in their view such a presumption in favour of this being income rather than capital. *Beyond the ordinary obligation of the Crown to show that the subject is liable to tax, for the moment I cannot see that any presumption of law arises one way or the other.*"

This view is the same as that laid down by PAGE, C.J., in the Rangoon Case. Let us see whether there is any foundation for the rule assumed in the Madras cases and how it came into existence. We find on a reference to the reported cases where this doctrine has been referred to or applied, that its ultimate basis is the decision of the House of Lords in *Scottish Provident Institution* v. *Allan* [1903 A.C. 129; 4 Tax Cas. 591]. The earliest case in India where the presumption is referred to is *Murugappa Chettiyar, In re* [(1926) I. L. R. 49 Mad. 465; 97 I. C. 395 ; A.I.R. 1926 Mad. 767]. This case is entirely based on the authority of the *Scottish Provident Institution Case.* The learned Judges thought that the view that there is a presumption that foreign remittances were remittances out of profits was 'warranted by the authority of that case'. But the case was decided on the ground that the Commissioner had come to the conclusion on the facts that the remittance was out of profits. The next case in which the presumption is adverted to is *Subbiah Iyer's Case* [(1930) I.L.R. 50 Mad. 510; 127 I.C. 131]. This case also no doubt contains a passage to the following effect, *viz.*,

"If there are profits in an assessee's foreign business sufficient to cover remittances to British India during the year of assessment the presumption is that the remittances were from profits and not from capital and the onus of showing that they were from capital and not from profits lies upon the assessee."

But this decision is not of much authority for two reasons : (i) the real question decided is that the presumption is rebuttable and that on the evidence in the case, had been rebutted ; and (ii) because the learned advocate who appeared for the assessee 'accepted the position that the burden of showing that the remittances were not from profits but from capital was upon him'. (Vide Judgment in the connected case of S.A. Subbiah Iyer reported in 127 I.C. 225 ; 58 M.L.J. 602 ; A.I.R. 1930 Mad. 457).

In the subsequent case of *Meyyappa Chettiyar* [1933 I.T.R. 37; 141 I.C. 330; A.I.R. 1933 M. 14) also the point was assumed.

There is no case in which the point directly arose for decision and was decided, except the Rangoon Case and in this PAGE, C.J., has after careful consideration held that the doctrine has no foundation. With regard to the *Scottish Provident Institution Case* upon which all the Madras cases are based we cannot do better than quote the following remarks of PAGE, C.J.—

"I venture to think that all that the learned Judges in the Court of Session meant by their observations was that there was material before the Commissioners upon which they were justified in finding as a fact that the remittances were profits and not capital and that an inference to that effect, that had been drawn by the Commissioners, was the inference which in the circumstances any reasonable businessman would draw from the materials before them. I do not myself think that their Lordships intend to hold that there was a *presumptio juris et de jure* that in such circumstances the remittances were profits and not capital."

The weight of authority so far as provinces other than the Madras Presidency, are concerned is thus decidedly in support of the view that there is no presumption of law one way or the other and we hope that the point would not be conceded or assumed but argued carefully before the Madras High Court when it next arises for decision.

The 'Tribune' Case.

At p. 246 infra we have reported a very interesting case which arose in the Punjab, in connection with the assessment of the income of the '*Tribune*', a newspaper which has a very wide circulation in that province. Income derived from property held under trust for charitable purposes is exempt from tax and the decision of the main question referred in the case depended on the meaning to be given to the expression 'charitable purposes'. This expression has been defined by our Act as including among others 'any object of general public utility' and the question was whether income derived from property vested in trustees for the object of carrying on a press and newspaper advocating a certain policy was income derived from property held under trust for 'an object of general public utility'. The Judges who heard the case (JAILAL and SKEMP, JJ.) differed and referred the matter to a Full Bench. The Judges who composed the Full Bench again differed. YOUNG, C.J., and ADDISON, J., have taken one view and TEK CHAND, J., has dissented. The opinion of YOUNG, C.J., and ADDISON, J., which has ultimately prevailed is that the income is not exempt from tax,

We are inclined to agree with the opinion of JAILAL, J., with which TEK CHAND, J., concurred, that—

'A trust of a public character in which no immediate or ultimate personal benefit of any kind is reserved to any individual, created with the object of founding and maintaining a paper which conveys news and opinions on matters of general interest to the public, discusses matters of public interest and educates the minds of its readers on lines which the founder considered to be beneficial to the public at large is a trust for the advancement of an object of general public utility as that expression is understood in law.'

While under the English Law it has been clearly laid down that every object of general public utility is not a charitable purpose the expression 'charitable purpose' has been expressly defined by the Indian Act as including '*any object* of general public utility' and the old English cases which define the meaning of the term 'charitable purpose' cannot therefore be relied on to cut short or restrict the plain meaning of the wide expression 'any object of general public utility'. The reason for giving a wider meaning to charitable purpose in an income tax statute is obvious.

The Chief Justice and ADDISON, J., have been much influenced by the consideration that the newspaper was carrying on a business like other newspapers and competing with them, and that the paper was sold for the same price as other newspapers and was not given free to the poor or needy. These factors are, as TEK CHAND, J., has observed, immaterial. The question in India is whether the object of the trust is one of general public utility.

The trustees in whom properties are vested for a charitable purpose, *e.g.*, support of orphans or widows may compete with other house owners in letting out the premises and may realise an exorbitant rent from the tenants. This would not render the income any the less income from property held in trust for a charitable purpose. Supposing again that a banker dedicates all the income from one of his banks permanently for a charitable purpose. Would the fact that the trustees were charging a high rate of interest prevent the income from being income from property held in trust for a charitable purpose?

(To be continued).

NOTES AND COMMENTS.

VOL. III, PART IX.

Exemption of Agricultural Income Received in Course of Money lending business : A Privy Council Ruling.

The decision of the Judicial Committee in *Commissioner of Income Tax, Bihar & Orissa* v. *Sir Kameshwar Singh (Maharajah of Darbhanga)* reported at p. 305 infra, affirming the decision of the Patna High Court reported at 1934 I.T.R. 107, deals with a question of far-reaching importance to money-lenders in India. Persons carrying on money-lending have often to advance money on possessory mortgage and pay themselves the principal and interest of the loan by appropriating the income of the mortgaged properties. The income tax authorities on such cases advance the view that, being income received in the course of a money-lending business, interest so received could be assessed as income from business. The Judicial Committee have clearly pronounced that this view is erroneous. Their Lordships emphatically state that the scheme of the Indian Income Tax Act is to exclude agricultural income from the scope of the Act, howsoever or by whomsoever received, and that such income does not lose the benefit of the statutory exemption of agricultural income and become assessable as business profits merely because it was received by the assessee not as an ordinary proprietor or landlord but as part of the income, profits and gains of a money-lending business.

The importance of this decision lies in the fact that it lays down a general rule applicable to all agricultural income and is not based on the facts of the particular case.

In view of their Lordships' pronouncement, we think the fact that the amount of rent that the mortgagee is allowed to appropriate for himself corresponds to a definite rate of interest on the loan advanced, a circumstance which may mislead income tax authorities to treat the income as mere interest, is quite immaterial. It is the nature of the income and not the motive or profession of the receiver that has to be considered. As their Lordships have pointed out, "the exemption is conferred and conferred indelibly on a particular kind of income and does not depend on the character of the recipient."

Where the mortgagee leases the property back to the mortgagor and receives rent from the mortgagor in lieu of interest on the loan there is some conflict of opinion among the High Courts as to whether such income is assessable as interest or exempt as agricultural income. The Madras High Court and the Allahabad High Court have taken the view that such income is agricultural income. We are of opinion that this is the right view and the fact that the Judicial Committee have referred with approval to the case of *Mukund Sarup* v. *Commissioner of Income Tax, U.P.* (I.L.R. 50 All. 496) and the principle laid down in that case, leads to the inference that even in the case of rent received by a mortgagee who has leased the property to the mortgagee himself such income is exempt and cannot be taxed as interest. Though the object of the money-lender may be to gain only a reasonable rate of interest on the amount advanced, if he undertakes the legal rights and liabilities of a lessor and the mortgagor, on the other hand, agrees to be his lessee paying him rent and subjecting himself to eviction on demand, the income received by the mortgagee is agricultural income, and the principle laid down by the Judicial Committee applies.

Foreign Branches: Theory of Constructive Remittance.

A clear instance of a constructive remittance from a foreign branch is to be found in the recent decision of the Madras High Court in *L.C.T.S.P. Subrahmanyam Chettiar* v. *Commissioner of Income Tax, Madras* (decided by MADHAVAN NAIR, OFFG. C. J., STONE, J. and KING, J., on September 18). The assessee carried on money-lending business at Tinnevelly (in British India) and at Penang (outside British India). A person deposited a certain sum of money with the assessee's Tinnevelly shop. This money was utilised for the Tinnevelly business. When he wanted the money back, the assessee gave him two *hundies* on the Penang shop for the amount due. The creditor sent them for collection to a banker at Penang and the amount was paid by the assessee's Penang shop. It was also admitted that the profits of the Penang business were sufficient to meet the *hundies*. The Income Tax Commissioner held that the assessee had discharged his indebtedness in British India by the issue of *hundies* drawn on his Penang shop, and had thus utilised in British India moneys available outside and that therefore there was a constructive receipt of those moneys in British India; and the High Court agreed with the Commissioner.

How to Avoid Tax in Such Cases.

The judgment in the abovementioned case and the English case of *Hall* v. *Marians* (18 Tax Cas. 148) which is distinguished by the Madras High Court, show that if the assessee wants to avoid payment of tax in British India in such cases *the proper procedure is to transfer the debt itself* to the place outside British India where the assessee has funds. If the assessee in the above Madras case had, with the creditor's consent, transferred the entire debt to Penang and the Penang shop had paid the debt at Penang, the case would have come within the principle of *Hall* v. *Marians* and he would not have had to pay income-tax in British India. It may be noted that the Commissioner and the High Court lay special emphasis on the fact that the debt had not been transferred to Penang in coming to the conclusion that there was a receipt of foreign income in British India. Businessmen and accountants would be well advised in keeping this distinction in mind when they want to make use of foreign funds to discharge British Indian debts.

Accumulation of Profits to Prevent Imposition of Income Tax.

Section 23-A (2) of the Indian Income Tax Act empowers the income-tax authorities to levy tax on the shareholders of a company in respect of their share in the profits of the company if it is found that the company had unnreasonably accumulated its profits without declaring dividends with the purpose of preventing imposition of income-tax. An interesting case where this section was applied (*Commissioner of Income Tax, Madras* v. *A. Harvey and others*) is reported at p. 311 *infra*. Three persons formed themselves into a private company with the object of holding shares in certain other companies and distributing the income therefrom among its shareholders. The company made large profits year by year but these profits were allowed to accumulate. In the accounts they were shown as 'transferred to General and Insurance Reserves.' The shareholders were not able to give any proper explanation for such accumulation and they were assessed under Section 23-A (2) in respect of their share of the profits and this assessment was upheld by the Court. There seems to be some difference between the English and Indian Law in this respect inasmuch as under the English Law (Section 21 of the Finance Act of 1922) it is not necessary that income-tax authorities have to be satisfied that there has been an intention to evade tax. There is a presumption of law, if the assessees fail to prove a reasonable cause for non-distribution, that there was an intention to evade tax. Under the

Indian Act the intention has to be established. But as the learned Chief Justice has rightly observed in this case, human motives are obscure and difficult to ascertain and are largely a matter of inference from the surrounding facts and circumstances, and if there are large profits and they are allowed to accumulate year after year and the company is not able to give any other motive or explanation for doing so, it would be reasonable to infer that the intention was to evade income-tax.

The assessees also tried in this case to take advantage of the fact that there was no express finding that the accumulation was made for the purpose of evading taxation. Their Lordships held that though it would have been better if there had been an explicit finding to that effect, such a finding could be implied from a statement of the Income Tax Officer that the conditions laid down in the section had been fulfilled.

Assessment of Subsidies.

The true nature of subsidies received by railway companies from the State has been decided by the Calcutta High Court in the recent case of *Ahmadpur Katwa Railway Co. Ltd., In re* [1935 I. T. R. 277]. An agreement between a railway company and the Secretary of State provided that 'if the net receipts of the Company shall not be sufficient to pay interest on the paid-up share capital of the company at the rate of 3½ per cent. per annum the Secretary of State will pay to the company such a sum as shall with the said net receipts make up an amount equal to interest at the rate of 3½ per cent. per annum' and it was contended on behalf of the railway company that the subsidy received from the State to make up the guaranteed interest was not 'income' of the company, that the company was merely a trustee for the shareholders, and the shareholders alone could be assessed. The High Court held that the word 'income' includes moneys which were in the coffers of the company and were available in the same way as earnings for the purpose of paying out as interest or dividend. The subsidy was received in lieu of moneys which might have been earned by the company and had the same nature as monies which were earned by the company as far as liablility to income-tax was concerned. Once the money was paid, it became 'income' and as such came within the grasp of income-tax and the fact that it was intended to be paid automatically to the shareholders and could not be spent by the company could not affect its liability to be taxed. Their Lordships have applied the principle of the English Cases of *Nizam's*

Guaranteed State Ry. Co. v. *Wyatt* (2 Tax Cas. 584), *Blake* v. *Imperial Brazilian Ry. Co.* (2 Tax Cas. 58) and *Pretoria Petersburg Ry. Co., Ltd.* v. *Elgood* (98 L.T. 741).

The learned Chief Justice (Sir Harold Derbyshire) has referred to the hardship that is caused by the view that such subsidies are liable to be taxed and invites the attention of the railway companies to Section 70 of the Indian Income Tax Act which invests the Governor-General with power to exempt from or reduce that rate of tax on any particular kind of income.

A subsidy like this differs from other income in that it is not really money earned but a contribution received to make up a deficit in income, and we hope the railway companies would take up the matter to the Privy Council and get a final pronouncement on the subject. The statement of the Chief Justice that the word 'income' means moneys which are in the coffers of the company and are available in the same way as earnings for the purpose of payment out as interest or dividend is open to criticism. Obviously there may be various kinds of moneys in the coffers of a company which are available for distribution as dividends which may not be assessable as income, *e.g.*, casual and non-recurring receipts. The questions that really arise are (i) whether a contribution which is received to make up a deficiency in income, profits or gains, is itself income, profits or gains and (ii) whether it is income of the company when it is given to the company for the specific purpose of payment to the shareholders.

Perhaps by framing the agreement in such a way as to create a specific trust in favour of the shareholders and making the company a mere trustee the difficulty can be avoided. The matter deserves the careful attention not only of railway companies but all companies receiving subsidies.

Companies in Liquidation and Income Tax Debts.

A question of some importance relating to companies in liquidation and income tax debts was raised recently before the Oudh Chief Court in *Income Tax Officer, Lucknow* v. *Lucknow Sugar Works* (reported *infra* at p. 322.) A company upon which notice was duly served, failed to make a return and a summary assessment was made. It was subsequently ordered to be wound up and the liquidator claimed that he was entitled to call upon the income tax authorities to prove the income tax debt. The income tax authorities contended that like other judgment debts which are not shown

to be fraudulent or collusive the income tax debt must be held binding on the liquidator. The Chief Court (SRIVASTAVA, J.) held that in view of the provisions of Section 229 of the Indian Companies Act the liquidator was entitled to call for proof of all debts, including judgment debts and that he had therefore right to call upon the income tax authorities to prove their claim. On the facts, the learned judge found that the company had in fact made no income in the year in question and held that the income tax debt was therefore not binding on the liquidator.

This decision leads to a somewhat anomalous state of affairs. Companies in winding up are in a peculiarly favourable position. They are entitled as a matter of course and without any reason whatsoever to re-open a best judgment assessment made before the order for winding up was made. Further, they are also entitled to throw upon the income tax authorities the burden of proving the correctness of a best judgment assessment made when the company was a running concern, and the official liquidator may even reject the claim for income tax if he thinks it is not justifiable.

NOTES AND COMMENTS.

VOL. III, PART X.

Hindu Undivided Family: Bombay High Court's View.

MOOLJI SICKA'S CASE.

Our readers may remember the case of *In re Moolji Sicka and others* reported in the April number of the *Income Tax Reports* at page 123 and our comments on this case which appeared at page 29 of our *Notes and Comments*. The Calcutta High Court held in this case that "Where in the sections of the Income Tax Act a Hindu undivided family is mentioned a Hindu co-parcenary is meant."

OUR COMMENTS ON THE CASE.

We pointed out that this proposition was wholly inconsistent with current notions with regard to the meaning of the expression "Hindu undivided family"; that it was not necessary in that case to come to this conclusion as the income in question in that case was income derived from the self-acquired property of a member and not his ancestral or family property; and that the observation made by their Lordships that if the expression 'Hindu undivided family' was given its wider meaning 'a most absurd and unanticipated position would arise and every Hindu possessing property or income who married would *ipso facto* become with his wife a Hindu undivided family' must be based on some misapprehension. We referred to the decision of the Madras High Court (SIR H.O.C. BEASLEY, C.J., SIR V. RAMESAM, J., and CORNISH, J.) *Vedathanni's Case* (1933, 1 I.T.R. 70) in which it was held that the expression Hindu undivided family was used in the Income Tax Act in its wider sense. We also referred to *Nathu Sao's Case* (1933, 1 I.T.R. 63) where the learned Judicial Commissioners of Nagpur also took the same view, and pointed out that the distinction between a Hindu co-parcenary and a Hindu joint family was a very old and well recognised one and that there was no justification for restricting the meaning of the expression 'Hindu undivided family' in the Income Tax Act to Hindu co-parcenaries when the legislature had advisedly used the expression 'Hindu undivided family'.

BOMBAY HIGH COURT'S VIEW.

A very important and authoritative pronouncement on this question was made recently by the Bombay High Court in *Commissioner of Income Tax, Bombay v. G. Lakshminarayan* reported at page 367 *infra*. A joint Hindu family consisted of the assessee, his father, his mother, and his wife. The father died, and at the time of assessment the family consisted of the assessee, his mother and his wife and the question whether the income received by right of survivorship by the assessee, the sole surviving male member, can be taxed in the hands of the assessee as his own individual income or it should be taxed as the income of a Hindu undivided family was referred to the Bombay High Court by the Commissioner of Income Tax, Bombay. Their Lordship had no hesitation whatsoever in coming to the conclusion that the expression 'Hindu undivided family' was used in the Indian Income Tax Act in its wider sense including families consisting of a sole male member and female members entitled to maintenance. Both the learned Judges have emphatically dissented from the opinion expressed by the Calcutta High Court in *Moolji Sicka's Case.*

The learned Chief Justice said :—

" The nature of a Hindu undivided family was perfectly well-known to the legislature when the Income Tax Act was drafted and it was well-known that the expression Hindu undivided family includes females and is much wider than the expression co-parcenary which includes only the males in whom the joint family is vested."

Referring to the Advocate-General's argument that a Hindu undivided family really meant only co-parcenary his Lordship said :—

"I see no ground for arriving at that conclusion since the meaning of the two expressions was well-known when the Act was drafted and the legislature has thought fit to use the wider expression rather than the narrower one. I have no doubt that this was deliberate."

With regard to the view propounded in *Moolji Sicka's Case* his Lordship said :—"I am unable to agree with that view which seems to me inconsistent with the words of the Act," and referring to the fear of LORT-WILLIAMS, J., that if we give a wider meaning to the expression an absurd result would follow, his Lordship said that "the view that the expression Hindu undivided family is used in its wider sense does not necessarily mean that every Hindu who

possesses a wife and a mother is necessarily a member of a joint Hindu family as LORT-WILLIAMS, J., seems to think in the Calcutta case referred to below."

Mr. Justice RANGNEKAR after pointing out that there is a clear and sharp distinction between the expressions 'undivided Hindu family' and 'co-parcenary' expressed his dissent from *Moolji Sicka's case* in these words:—

"The learned Advocate-General has referred to an unreported decision of the Calcutta High Court and produced an uncertified copy of the judgment. I have no hesitation to say, with respect to the learned Judges in that case, that their reasoning does not appeal to me and is opposed to the fundamental principles of the Hindu law."

TO SUM UP.

As the law now stands there are two decisions, one of the Madras High Court (*Vedathanni's case*) and one of the Nagpur Judicial Commissioner's Court (*Nathusao's case*) which hold the view that the expression Hindu undivided family is used in the Income Tax Act in its wider sense and not as meaning co-parcenaries only. In *Moolji Sicka's case* the contrary view was taken, but, as we have pointed out above, this expression of opinion was unnecessary for the decision of the case and further its authority has been utterly shaken by the very emphatic and strong dissent expressed by the Bombay High Court in *G. Lakshminarayan's case* which contains a clear, well-considered and direct pronouncement on the subject.

Expenditure Incurred with a view to Resume a Business.

In these days of depression companies are sometimes forced to stop some of the business carried on by them until conditions become more favourable. The important question whether expenses incurred by way of wages, salary, and depreciation allowance in relation to the business which has been temporarily stopped can be deducted from the profits accruing to the company from its other businesses was recently considered by a Special Bench of the Madras High Court (MADHAVAN NAIR, OFFG. C. J., STONE, J. and KING, J.) in *The General Corporation Ltd.* v. *Commissioner of Income Tax, Madras*, reported in this issue. The General Corporation Ltd., carried on business in motor accessories at Madras, Bombay, and other places and in mica mining at Vellore. The mica business had to be temporarily stopped on account of a cyclone but the company did some prospecting work keeping a reduced staff, with the intention of resuming the business if conditions and prospects

proved favourable, and incurred expenses by way of wages, salary etc. There were however, no receipts from this business. The income tax authorities refused to deduct these expenses and depreciation allowance in respect of this business against the profits which the company had earned from its other businesses. It was argued for the Commissioner that as no business was being carried on at Nellore the loss claimed was not a loss arising from the carrying on of a business, but loss of a capital nature. Referring to this argument the learned Officiating Chief Justice said :—

"In our opinion this argument cannot be accepted. According to its memorandum one of the objects of the company was to search for, win, work and get mica. When production was stopped by a cyclone, the company started prospecting to find out whether the business can be carried on and incurred the expenses in question with a view to resume production. How can it then be said that the business had stopped? It is admitted that the old staff of the company doing the mica business was maintained by it on a reduced scale, the work of prospecting was done by the staff, and that the expenses were incurred in trying to see whether the production can be resumed. It appears to us that the fact that there was some period of inactivity in the carrying on of the business does not really affect the question, nor is the question affected by the consideration that the business was not resumed after the expenses had been incurred."

The real question in such cases is whether the business has been stopped in a strict legal sense and this mainly depends upon the intention of the company.

Difference Between Resuming Old Business and Starting New Business.

In this connection an important distinction should be noted between expenses incurred with a view to start a new business and expenses incurred with the intention of resuming an old business. Their Lordships have observed that "expenses incurred in connection with the restarting an old business even though it is not resumed, should be treated on a different footing from expenses incurred with a view to start a new business altogether."

Applicability of Section 26 (2) to Joint Family Businesses.

J. Kesava Rao v. *Commissioner of Income Tax, Madras*, reported below deals with a question of some practical importance to

Income Tax Officers, namely, whether when the father of a Hindu undivided family dies and the business of the family devolves on the son, the son can be assessed as a 'successor' under Section 26 (2) of the Indian Income Tax Act. A Special Bench of the Madras High Court (MADHAVAN NAIR, OFFG. C.J., STONE, J., and KING, J.), have held in this case that the word 'succession' as used in Section 26 (2) connotes a transfer of ownership and the person who succeeds to another must have, by such succession, become the owner of the business which his predecessor was carrying on and which he, after the succession, carries on in such capacity, *i.e.*, the capacity as owner. There is no 'succession' where the joint family business devolves on a Hindu son on the death of his father. The business devolves in such cases by the right of survivorship under the Hindu Law and the son cannot be assessed as a successor to the business under Section 26 (2) of the Act.

The question whether the expression 'Hindu undivided family' is restricted in its meaning to co-parcenaries or includes joint families consisting of a single male member and female members entitled to maintenance was also mooted in this case but their Lordships did not express any opinion on the question as the decision of point mentioned above was sufficient for the disposal of the case.

Sale for Arrears of Income Tax, Whether Conveys Title Free From Encumbrances.

Section 46 of the Indian Income Tax Act provides that arrears of income tax may be recovered by the Collector from the assessee 'as if it were an arrear of land revenue.' A sale for arrears of land revenue conveys to the purchaser a prior title free from all encumbrances. Does a sale for arrears of income tax also confer such a preferential title? This question was raised before the Madras High Court in the case of *Chinnamal Achi* v. *C. M. S. Rowther* reported at page 364 below and their Lordships' opinion is expressed in the following words :—

"It is only if the sale is for land revenue that the purchaser gets a preferential title free from all encumbrances. Such a priority does not attach itself to sales for the enforcement of other dues even if the sale is held under the provisions of the Revenue Recovery Act."

It was held in this case that a person who had purchased certain properties at a sale by the Collector under the Revenue

Recovery Act in pursuance of an attachment made for arrears of income tax did not acquire a better title than a rival claimant who had purchased the same property in a sale by the Official Receiver, even though the attachment for arrears of income tax was prior in date to the adjudication of the assessee as an insolvent.

Income From Foreign Exchange Business.

A decision of far-reaching importance to commercial circles on the one hand and the Crown on the other has been decided by the Bombay High Court in *Commissioner of Income Tax, Bombay* v. *Chunilal B. Mehta* reported *infra* at page 376. Foreign exchange business is caaried on on a large scale in the seaports and large profits are made by persons residing in India. The essential feature of this kind of business is that a person in India sends instructions to a broker in a foreign place (*e.g.*, New York or Liverpool) to buy or sell commodities, and the broker, acting on the instructions, enters into the requisite contracts with third parties on the foreign exchange and informs his principal accordingly. Profits made by this business may be remitted to British India. In such a case it is clear that the principal can be assessed to income tax in British India on the profits, as they are received in British India. Supposing the profits are not remitted to British India, is he liable to be assessed in British India on the profits thus made? The answer to this question depends on whether the profits can be said to 'accrue or arise' in British India within the meaning of Section 4 of the Indian Income Tax Act. The learned Judges of the Bombay High Court, after making a preliminary remark that the question is of considerable importance and not easy to answer, have come to the conclusion that such profits do not accrue or arise in British India, but at the place where the contracts are made by the broker and that, therefore, such profits are not assessable in British India under the Indian Income Tax Act. In their Lordships' opinion the question to be determined in this connection is the place where the profits accrue or arise and not the place where the business in which the profits are earned is carried on or where the assessee resides. The fact that the contracts were entered into by reason of instructions received from India and that it was through the skill and judgment of a person residing in India that profits were earned was held to be immaterial. The Advocate-General argued that once you find that a business is carried on in British India all the profits arising from that business must be held to accrue in British India, but their

Lordships said that to hold so would be to strain the language of Section 4 which deals with the place where the profits accrue or arise and not the place where the person who is the ultimate source of profit resides or carries on the business.

Actual delivery is often not intended to be given or taken but the accounts are settled by mere payment of differences. The learned Judges have held that it makes no difference for the purposes of income tax whether the contract of sale and purchase were followed or intended to be followed by the actual delivery of the commodities or whether the contracts of sale and purchase were intended to be closed and were closed by corresponding contracts of purchase and sale so as to result merely in payment of differences.

Scope of Section 34, Income Tax Act.

There is much confusion about the true scope of Section 34, Indian Income Tax Act. The decision of the Bombay High Court in *Commissioner of Income Tax, Bombay* v. *G.V. Manohar* reported below, however, shows that the section has no application to cases where a succeeding Income Tax Officer merely thinks on the same facts that the estimate of income made by his predecessor was too low. In this case, as the assessee had kept no books of account the Income Tax Officer assessed his income at a flat rate of 8 per cent. on the sale and on that basis made an assessment. His successor thought that the prices had risen very rapidly during the last two months of the previous year of assessment and that his predecessor had under-estimated the profits derived from the sales. He considered that income should have been computed at a flat rate of 15 per cent. and not 8 per cent. and holding that income had consequently escaped assessment made a re-assessment under Section 34. Their Lordships held that the facts merely showed that the Income Tax Officer of the subsequent year thought that his predecessor had made a wrong assessment as to income and that in his opinion his predecessor's estimate was too low. This was not proof that any income had escaped assessment or was assessed at too low a rate and the re-assessment under Section 34 was illegal. Their Lordships have followed the actual decision of the Rangoon High Court in *Commissioner of Income Tax, Burma* v. *U Lu Nyu* (1933, 1 I. T. R. 373), though with some of the observations contained in that case their Lordships do not agree. We do not think that the learned Chief Judge of Rangoon intended to lay down in *U Lu Nyu's Case* that if income from a particular source has been

once assessed it cannot be re-assessed. The observation in the said case that the Income Tax Officer had no jurisdiction to revise the assessment which was completed and become final must be read with the facts of the case and if so read there is nothing in the statement of PAGE, C. J., to which objection could be taken.

Income Tax Reports.

NOTES AND COMMENTS

VOL. III, PART XI.

The Judicial Committee on Depreciation of Machinery: Conflict Set at Rest.

In the appeal preferred by the Commissioner of Income Tax, Madras, against the judgment of the Madras High Court in the *Buckingham & Carnatic Co's case* (decided by the Privy Council on October 25, 1935) the Judicial Committee have made an authoritative pronouncement on the interpretation of Section 10 (2) (vi) of the Indian Income Tax Act, upon which there was much conflict of opinion in India. Section 10 (2) (vi) provides that in respect of depreciation of buildings, machinery, plant or furniture profits or gains shall be computed after making allowance of a sum equivalent to such percentage on *the original cost thereof to the assessee* as may in any case or class of cases be prescribed. The expression 'original cost thereof to the assessee' was held by the Madras High Court to mean in the case of transfer the original cost of the machinery to the transferor. The Bombay and Patna High Courts took the view that the expression meant original cost to the transferee. The Judicial Committee have upheld the view of the Bombay & Patna High Courts and dissented from the Madras view and now it is settled law so far as India is concerned that where buildings or machinery have been transferred, depreciation allowance has to be calculated on the original cost to the transferee who is assessed to income tax and not to the previous owner of the business. Their Lordships are of opinion that the word 'assessee' is used in the sub-section in two places, firstly, with regard to the ownership of the property and secondly with regard to the original cost thereof. In the ordinary and natural meaning of the sub-section the word assessee used in the two connections must refer to the same person and that person is he who owns the property in question and who is being assessed.

This interpretation is of course the easiest and most natural interpretation that can be put upon the sub-section but it is obvious that calculation of depreciation based on the cost of the machinery to the actual assessee is not only not scientific but may also lead to constant fluctuations where there are successive transfers and to anomalous results where the property is bequeathed or gifted. The Madras High Court, by laying more emphasis on 'original cost' made an attempt to solve these difficulties by having a more stable and correct basis for depreciation allowance, *viz.*, the original cost of the

machinery irrespective of what successive transferees might pay or might have paid for it. The judgment of the Judicial Committee does not contain any reference to these difficult points which led to the conflict of opinion. But as regards the interpretation of the section the opinion of the Judicial Committee is final and we have to solve the difficulties that may arise as best as we can as and when they arise.

Judicial Committee on Assessment of Non-Residents.

Assessment of income earned by non-residents presents many difficult questions of law and fact. The term 'business connection' in Section 42 (1) is difficult to define and more difficult to apply to the facts of a case. The decision of the Judicial Committee in *Commissioner of Income Tax, Bombay* v. *Currimbhoy Ibrahim & Sons, Ltd.*, clears some ground. It establishes that a mere advance of a loan by a non-resident to a person carrying on business in British India by itself does not create any business connection between the non-resident lender and the British Indian borrower so as to permit interest earned by the non-resident being deemed income arising or accruing within British India within the meaning of Section 42 (1) of the Indian Income Tax Act, and the borrower being assessed as the non-resident's agent in respect of such interest. Where there is nothing to show that the lender carries on the business of money lending the fact that the borrower took the loan to carry on a business in British India cannot render the interest earned by the lender income earned through a business connection in British India.

Interpretation of Section 42 (1) : Meaning of 'Business Connection' and 'Property'.

Apart from the actual decision in the case, the judgment of the Judicial Committee in *Currimbhoy Ibrahim & Sons' case* deals with some points of general importance relating to the interpretation of Section 42 (1) of the Income Tax Act. It was contended on behalf of the assessee that the words 'business connection' and 'property' in Section 42 (1) are intended as repetitions of the expressions 'business' and 'property' appearing in Section 6 to describe 'Heads of Income' and that Section 42 (1), therefore refers only to the two heads of income 'business' and 'property.' Their Lordships held that this contention was unsound. The phrase 'business connection,' their Lordships said, was different from, though not unrelated to, 'business' and the word 'property' as it occurs in Section 42 (1) cannot be given the special meaning which is attached to it in Section 9. It is used as an ordinary English word to be taken in its usual signification and there is nothing to exclude from its scope any of the six classes of income mentioned in Section 6 of the Act.

Again their Lordships say that the word 'property' is used in Section 42 (1) to mean something tangible though it is not confined to immovable property or to buildings or lands appertaining thereto. Section 42 (1) plainly implies that the property must be situated in British India and though for the purposes of administration or succession or for purposes of jurisdiction to attach a debt, a chose in action is treated notionally as situated in a particular country or district, the Income Tax Act does not intend to import questions of this character as the test whether income which does not accrue within British India shall be deemed so to accrue. In their Lordships' opinion the phrase 'property in British India' in Section 42 (1) has to be taken literally and simply as, for example, where furniture situated in British India had been hired under an agreement whereby the hire is payble outside British India.

'Association of Individuals': Co-owners in Joint Enjoyment.

In *In re Elias and others* the Calcutta High Court has delivered a judgment which may have unforeseen and far-reaching consequences if it is correct. Four persons purchased a certain property consisting of buildings and their shares were 1/3, 1/6, 1/6 and 1/3 respectively. In the deed of conveyance these four persons were described as the purchasers and they were to have and to hold the said premises absolutely and for ever as tenants in common in the abovementioned shares.' Three of them subsequently executed a power of attorney in favour of the fourth to manage all their affairs in relation to the abovementioned properties and other proparties belonging to them and the latter continued to manage the properties. These four persons were assessed to income tax and super tax on the income derived from the buildings as an 'association of individuals' though they contended that they did not constitute an association of individuals within the meaning of the Indian Income Tax Act but were merely co-owners and could only be assessed as co-owners. It may be noted, by the way, that assessment as an association would expose the assessee to a higher rate and higher amount of both income tax and super tax. The Calcutta High Court (SIR HAROLD DERBYSHIRE, C.J., & COSTELLO, J.) held agreeing with the Commissioner, that the assessees constituted an association of individuals and were rightly assessed as an association.

With all respect to the learned Judges we think this is a clear case of co-owners. The learned Chief Justice has relied on three circumstances for coming to the conclusion that the assessees constituted an association. "In the first place," says his Lordship, "they joined together in the purchase of this property on January 9, 1920. In the second place, they have remained joint as owners of this property from the date of this purchase down to the present time. Thirdly, they have joined together, as the powers of attorney show, for the purpose of holding this property and of using it for purpose of earning income to the best advantage

of their own." In our opinion none of these circumstances can convert mere co-owners of immovable property who hold definite shares in such property into an association of individuals for the purposes of assessment to income tax. We think a distinction must be made between co-owners who enjoy property as tenants in common and 'an association of individuals' owning property. The expression 'association of individuals' is intended to apply to combinations such as clubs, societies, and other institutions and is not applicable to co-owners of immovable properties holding definite shares therein even though they might have purchased the property under the same sale deed and appointed an agent by the same power of attorney.

Reference From Order Refusing to Cancel Best Judgment Assessment (Calcutta View).

There is much conflict of opinion on whether a reference to the High Court can be made in best judgment assessment cases. The weight of authority is now in favour of the view that a reference is not competent in such cases. The Rangoon High Court in *Abdul Bari Choudhury* v. *Commissioner of Income Tax, Burma* [(1931) I.L.R. 9 Rang. 281], took that view and in *Jotram Sher Singh* v. *Commissioner of Income Tax, U. P.* [(1934) 2 I.T.R. 229] the Allahabad High Court followed *Abdul Bari Choudhury's case.* The question recently arose before the Calcutta High Court in *In re Kesardeo Chamria* (reported below) and this High Court has also followed these two cases.

In the Calcutta case an Income Tax Officer made a best judgment assessment. He refused to cancel this assessment on an application made by the assessee under section 27 and on appeal the Assistant Commissioner confirmed the order of the Income Tax Officer refusing to cancel the assessment. Both the Income Tax Officer and the Assistant Commissioner on appeal, were of opinion that the assessee was not prevented by any reasonable cause from filing a return of income or producing his books. Though the Commissioner of Income Tax was also of the same opinion and was also of the opinion that there were sufficient materials before Income Tax Officer and the Assistant Commissioner for coming to such a finding he referred to the High Court the question "whether in the circumstances of the case there were any materials on which the Income Tax Officer could base his finding that the assessee was not prevented by sufficient cause from filing the return called for under Section 22 (2) or producing the accounts called for under Section 22 (4)."

Decision in Chamria's Case.

The High Court held that it was clear beyond all question from the circumstance of the case and the authority of the two decisions referred to above that in the present case there was no

question of law which could be referred for the opinion of the Court under the provisions of Section 66 (2) of the Income Tax Act and that there was no obligation on the Commissioner of Income Tax to have formulated the question which he submitted to the Court—no necessity whatever. On the competency of a reference in such cases their Lordships referred to the following opinion of the Commissioner and said that with that opinion they entirely agree :—

"The only questions that can be raised in an appeal against an order under Section 27 and in the case of an assessment under Section 23 (4) are: (1) whether the assessee was prevented by sufficient cause from making the return required by Section 22; or (2) whether he received a notice issued under Section 22 (4) or Section 23 (2); or (3), whether he had a reasonable opportunity to comply with the terms of the notices; or (4) whether he was prevented by sufficient cause from complying with the terms of the notices......Now the scope of an appeal in such a case being thus limited the only question of law that can arise out of such appellate order must relate to the above matters, but it seems fairly clear that all these are questions of fact."

COSTELLO, J.'S VIEW.

So far the ground is clear but there is some confusion when we proceed further. Mr. Justice DUNKLEY has stated in *Abdul Bari Choudhury's case* that "the only question of law which could possibly arise out of such a finding is whether there were any materials on which the Income Tax Officer could base his finding." These observations were taken by the Commissioner to mean that he should make a reference even though he was of opinion that there were sufficient materials to support the findings of the Income Tax Officer and the Assistant Commissioner. Referring to these observations of DUNKLEY, J., COSTELLO, J., says "now, as I read the judgment, it seems to me that at the very utmost what Mr. Justice DUNKLEY intended to say was that there might possibly be a question of law. In this respect the assessee might be able to ask the Commissioner of Income Tax to state a case if he was in a position to say that there were *not any* material on which the Income Tax Officer could base his finding or, as it is usually put in analogous circumstances, that there was *no* evidence on which the Income Tax Officer could find as he, in fact, did find. That is putting the matter at the very highest, but in view of the opinion expressed by Sir ARTHUR PAGE, the Chief Justice, and the other three Judges who agreed with him but did not give separate judgment I incline to the view that even that is not the correct position". In thinking that the opinion of SIR ARTHUR PAGE and his colleagues differs in any way from that of DUNKLEY, J., COSTELLO, J., as well as the Commissioner do not seem to be right, for we find that Sir ARTHUR PAGE, with whom the other Judges agreed, expressly says in his judgment, like DUNKLEY, J., that :—

"The only question of law that could arise is whether there were any materials upon which the Income Tax Officer or the Assistant Commissioner could find that there was no sufficient cause excusing the assessee from complying with the requirement of the law as prescribed in Section 27."

This passage in the judgment of Sir ARTHUR PAGE, C.J., appears to have escaped the notice of the learned Judge and the Commissioner.

The correct view of this matter seems to be:—(1) that the questions that arise in an appeal from an order under Section 27 refusing to cancel an assessment are all questions of fact but whether there is evidence to support a finding, even if the finding be one of fact, is a question of law, and the fact that the burden of proof is on one side or the other does prevent the raising of such a question; (2) the observation of DUNKLEY, J., that "the only question of law which could possibly arise out of such a finding is whether there were any material on which the Income Tax Officer could base his finding" is therefore perfectly sound; (3) this does not, however, mean that in every case the assessee is entitled to raise the question whether there were materials to support the finding, or that the Commissioner of Income Tax is bound whenever the assessee raises such a question to refer it to the High Court; (4) the Commissioner is not precluded from raising such a question and referring it to the High Court if he entertains any doubt as to whether there are materials to support the finding of the Income Tax Officer; (5) the High Court can also require the Commissioner to refer such a question if it entertains a doubt that there are not materials to support the Income Tax Officer's finding.

If Mr. Justice COSTELLO is of opinion that there cannot be a reference even if the Commissioner or the High Court is of opinion that there is no evidence to support the finding, his opinion seems to go too far. At any rate it is clear that the opinion of Sir ARTHUR PAGE and his colleagues which COSTELLO, J., thinks supports such a conclusion does not warrant any such conclusion but points the other way.

Co-owners : Allowance Received by Managing Co-owner, Whether 'Salary' or 'Agricultural Income'.

The decision of the Lahore High Court in *Major Conville* v. *Commissioner of Income Tax, Punjab and N. W. F. P.* (reported below), raises a question of considerable importance relating to the assessment of estates. It is not unusual for co-owners to appoint one amongst themselves to manage the estate on behalf of all of them and to allow him a portion of the income for his services in addition to the share of the income to which he is entitled by virtue of his right as a co-owner. In such cases the question would arise whether the excess income received by the managing co-owner

over and above his legitimate share is assessable to income tax as "salary" or is exempt from tax as "agricultural income." In *Conville's case* it was agreed between a father and his son that the son shall reside in the estate and manage it under the directions of his father, receiving a certain allowance, and the net income after deducting this allowance was to be divided according to their respective shares. The son contended that the entire income received by him including his allowance was agricultural income. On the other hand, the income tax authorities held that the whole amount received by him including his legitimate share of the income was assessable as salary. The High Court held that the portion of the income received by the assessee over and above his legitimate share of it was assessable as salary and that the assessee was entitled to treat that, and only that part of his income as agricultural which he received as of right by virtue of the ownership of his share.

The test of assessability laid down by their Lordships in the judgment, appears to be whether the income was received by virtue of the assessee's right as co-owner or whether it was received in lieu of the extra labour and services rendered by him.

We venture to doubt the correctness of this test. The true test is not whether the income was received by virtue of the right of ownership or as remuneration for management, but depends upon the *nature of the income itself*. If the income is really agricultural as defined in the Act it would, we think, be exempt whether it be received by virtue of the assessee's right as a co-owner or as remuneration for services rendered as manager. To take a concrete case, if *A* and *B* who have equal shares in an estate agree that *A* should manage it and receive 2/3rds of the income in view of his services as manager and *B* only 1/3rd, according to the Lahore decision *A* could be assessed to income tax on 2/3rd *minus* 1/2, that is, 1/6th of the income. But we think the whole of the income received by *A* would be exempt as *A* receives it as agricultural income. Of course, the position would be different, if the assessee does not receive the excess income as agricultural income but receives it from the other co-owners after the agricultural income has been received as such by the co-owners. The distinction though nice is a real one and this, we think, is the true criterion for deciding whether the excess income received by a managing co-owner is assessable or not.

It should be remembered in this connection that income, if it is really agricultural income, will not cease to be exempt from tax even though it is received by the assessee by way of salary. This is made clear by the recent decision of the Privy Council in *Commissioner of Income Tax* v. *Sir Kameshwar Singh* (1935 I.T.R. 305), where their Lordships expressly say that even if an income falls within one of the six heads mentioned in Section 6 it would still be exempt from tax if it is agricultural in its nature. In this case their

Lordships have pointed out in clear and unmistakeable terms that agricultural income is excluded altogether from the scope of the Act "howsoever or by whomsoever it may be received."

It is very important, therefore, for co-owners to note this distinction in entering into agreements for management. If they frame the agreement in such a way that the extra income payable to the managing co-owner is to be received by him as agricultural income they would not lose the benefit of the exemption but if the allowance is made payable otherwise, they may find themselves within the clutches of income tax.

Income Tax Reports.

VOL. III, PART XII.

NOTES AND COMMENTS.

Section 34 of the Indian Income Tax Act: (A Lahore Full Bench Decision).

Judicial opinion regarding the interpretation and scope of Section 34 of the Indian Income Tax Act is in a confused state. In the Lahore High Court there was conflict of opinion between *Diwan Kishen Kishore's Case* (1933, 1 I.T.R. 143; 14 L. 225) and *Amir Singh Sher Singh* v. *Commissioner of Income Tax, Punjab* (1934, 2 I.T.R. 171). The matter was consequently referred to a Full Bench of the Lahore High Court in *Madan Mohan Lal's Case* (reported below). But unfortunately, instead of the conflict being set at rest, we find that some observations of the Judicial Committee in *Rajendra Nath's Case* (61 Cal. 215; 2 I.T.R. 71) have opened a fresh arena and the Judges who heard the case have again differed. Though, so far as the Province of Punjab is concerned, the opinion of the majority is binding on the Courts and income tax authorities, the matter cannot be regarded as beyond doubt.

VIEW OF THE MAJORITY.

The majority of the Full Bench (SIR JAMES ADDISON, AG. C. J., and DIN MOHAMMAD, J.) have expressed the opinion that Section 34 is not confined to cases where the income in question is not disclosed in the return. Their Lordships are of opinion that if an item of income is included in the return submitted by an assessee during the tax year, but is left unassessed by the Income Tax Officer, or if assessed in the first instance, the assessment is cancelled by an appellate or revisional authority, it escapes assessment within the meaning of Section 34.

DALIP SINGH J.'s VIEW.

DALIP SINGH, J., has in a dissenting judgment, expressed that the word 'escaped' is equivalent to 'eluded notice' and that if income has once been disclosed in the return it cannot escape from the assessment. The learned Judge has laid much strees on the observation made by the Privy Council in *Rajendra Nath's Case* (I.L.R. 61 Cal. 255) that 'escaped assessment' does not mean 'has not been assessed'.

OUR COMMENTS.

We think that the opinion of the majority, on the one hand and the opinion of the dissenting Judge on the other, express two extreme views and the correct interpretation of 'escaping assessment' lies between the two. The majority are, we think, right in saying that Section 34 is not confined to cases where income has not been disclosed in the return, Income can 'escape assessment' even

though it has been returned and disclosed. But they do not seem to be right in laying down without any qualification that whenever the Income Tax Officer has not assessed or his assessment has been cancelled in appeal or revision the income 'escapes assessment'. In our opinion, in order that an income which has not been assessed may have 'escaped assessment' there must be something in the circumstances in which the income was not assessed by the Income Tax Officer or his superiors from which we can say that the income has 'escaped' assessment and has not merely been not assessed. Whether income has in fact 'escaped' assessment depends on the facts attending its non-assessment. DALIP SINGH, J., is therefore right in saying that 'escaped assessment' is not equal to 'has not been assessed' and this view is entirely supported by the statement of the Privy Council in *Rajendranath's Case.* But in going further and saying that it means necessarily 'eluded notice' and that once income has been returned it cannot 'escape assessment'. DALIP SINGH, J., has gone too far. Just as a thief may 'escape' from us after he has been noticed by us or even after he has been caught, *e. g.*, by force or fraud or by our carelessness or inadvertence, income may escape assessment by an Income Tax Officer even though it was disclosed to him.

THE DECISION.

If we brush aside for a moment observations and generalisations and concentrate our attention on the facts of the case, as we ought to do in cases under Section 34, the view of the majority appears to be clearly right. The assessee was the manager of a Hindu undivided family. He had also some private income. He showed a certain item of income in the return of his private income. The Officer who was assessing the joint family held that this item belonged to the joint family and included it in the family assessment and so the officer making the individual assessment excluded this item from the individual assessment. On appeal by the joint family the Assistant Commissioner held that the income was not family income and thereupon the Income Tax Officer making the individual assessment held that this item had 'escaped' from the assessment of the assessee and assessed it under Section 34. This seems to be a clear, typical case of income escaping assessment.

RESULT OF THE DECISION.

The view laid down in *Kishen Kishore's Case* that Section 34 only covers accidental or inadvertent omissions stands overruled and the view of the Madras and Calcutta High Courts (which we had also preferred as the better view in our Notes and Comments), is affirmed by the Full Bench.

While the learned Judges have disagreed with *Kishen Kishore's Case*, they have not gone to the full extent to which the Judges in *Amir Singh Sher Singh's Case* have gone. The learned

judges who decided the latter case threw doubts on the decision of the Rangoon High Court in *U Lu Nyu's case* (12 Rang. 118 ; 1933, 1 I.T.R. 373). We pointed out in our *Notes and Comments* that these doubts were unfounded and this *Rangoon case* (which merely laid down that Section 34 cannot be interpreted so widely as to empower Income Tax Officers to go on revising their predecessors' estimate of income under Section 34 merely because they think that that estimate is too low) is good law, and we are glad to find that the Full Bench have agreed with this view. DIN MOHAMMAD, J. has carefully distinguished that case, with the further remark that such a procedure is 'obviously unauthorised' and does not come within Section 34 ; and the Acting Chief Justice has also distinguished the case without throwing any doubts whatever upon it. It is gratifying to note (see the judgment of DALIP SINGH, J.) that Mr. Jagannath Aggarwal, one of the ablest lawyers of Northern India who has been the Standing Counsel for the Commissioner of Income Tax, Punjab, for several years conceded—in our opinion quite fairly and rightly—that *U Lu Nyu's case* was rightly decided. We have referred to this matter in some detail as we find that some observations in *U Lu Nyu's case* have been misunderstood and dissented from in a recent Bombay case, *Commissioner of Income Tax, Bombay* v. *G. V. Manohar* (1935, 3 I.T.R. 372 : *vide* Our Notes and Comments, October part, p. 77 ff).

TO SUM UP.

In our view the decision of the question whether income has escaped assessment in a case and whether it can therefore be assessed under Section 34 depends upon the facts attending the non-assessment in that particular case and no general rule can be laid down as to what constitutes 'escaping'. The only thing that can be said is that income which 'has not been assessed' is a genus of which income which 'has escaped assessment' is only a species and 'eluding notice' is only one of the ways in which income can escape assessment.

The following table may make the position clearer :—

Income which 'has not been assessed'

Income which has 'escaped assessment'

Income which has not been assessed but has not 'escaped assessment'

Income which has escaped assessment by 'eluding notice'

Income which has escaped assessment in other ways.

The Proper Procedure In Cases of Alternative Liability to Assessment.

As it is probable that some Judges of the other High Courts may also adopt the view taken by DALIP SINGH, J., in the above-mentioned case, (though in our opinion it is not correct), we may as well draw the attention of income tax authorities to what, according to DALIP SINGH, J., is the proper procedure which the income-tax authorities should adopt in such cases. The learned Judge said:

Lastly, I would point out that the remedy was entirely in the hands of the income tax authorities on a different procedure. They knew that the Hindu joint family assessment was under appeal. The personal assessment could have been forwarded to the appellate authority, the Assistant Commissioner, with the request that if he came to a different conclusion from the Income Tax Officer on the subject of the item in dispute the personal assessment should be revised under the power conferred under Section 33 on the Commissioner.

Where a person has to be assessed on his individual income as well as in his capacity as manager of a Hindu undivided family, the income tax authorities would be well advised in hearing the two cases together so that there may be no conflicting findings, and no necessity to resort to Section 34.

Private Enquiries By Income Tax Officers.

The Allahabad High Court has, in *Gopinath Naik* v. *Commissioner of Income Tax, U. P.* (decided on November 22) made some pronouncements which, if adopted by the other courts also, may entirely revolutionise the system of income tax administration and the nature of income tax inquiries. The purport of the decision is that it is not open to an Income Tax Officer, if he finds that a return is incomplete or false to make private enquires. The proceedings before him after he has issued a notice to the assessee under Section 22 (2) are of a judicial nature, he can only take such evidence as is admissible under the Indian Evidence Act, and if he has relied on any evidence which is not strictly admissible under the Evidence Act, Section 167 of the Evidence Act has to be applied to determine whether his assessment is valid. This is the opinion of NIAMATULLAH, J., and SULAIMAN, C. J., but BAJPAI, J., has not agreed with this view. As the question is of very great importance to income tax authorities, and as it will affect the entire administration of the law of income tax throughout India and necessitate judicial training for Income Tax Officers we are reserving our comments for our next number. The judgments delivered, which are rather long ones, will also be reported in full in the January number.

PAYMENT OF INSTALMENTS: WHETHER CAPITAL OR INCOME FOR TAX PURPOSES.

[FROM THE LAW JOURNAL (ENGLAND)]

The Income Tax Act purports to tax income and not capital. When a sum of money is payable by instalments, the principle is clear that tax is only payable in respect of that part of the instalment which represents income, *e.g.*, interest; and no tax is payable in respect of such part of the instalment as represents capital. There may be cases however in which the whole of the instalment represents capital and is not taxable, while on the other hand there may be cases in which the whole of the instalment represents income, so that the whole amount thereof is rendered assessable to tax.

It is not always an easy matter, however, to determine what is the essential nature of the payment, *i.e.*, whether it is capital or income. The Courts are not bound in any way by whatever terms the parties themselves may have elected to describe the payment, and in each case the substance of the transaction will be carefully and closely scrutinised.

There is a long line of income-tax decisions dealing with this vexed problem and certain tests have been indicated in the cases for the purpose of determining the essential character of such payments. It will be the purpose of the present article to examine some of the more important authorities and to state the tests which they indicate should be applied for the purpose.

The judgment of ROWLATT, J., in *Jones* v. *Inland Revenue Commissioners* (1920, 1 K.B. 711; 89 L.J.K.B. 129) will be found particularly instructive. In that case the appellant had sold his interest in certain inventions and letters patent for a sum in cash and a percentage called a "royalty" payable for ten years on the sale of all machines constructed under the patent. The question that arose was whether the sum received by the appellant in respect of this "royalty" or percentage of sales, constituted taxable income which accordingly was to be included in the computation of the appellant's total income for sur-tax purposes.

The main contention on the part of the appellant was that the royalty was not in respect of the use of his patent, but formed part of the purchase consideration for the invention and letters patent, and therefore constituted capital and not income. ROWLATT, J., held however, that the royalty, notwithstanding that it might have been part of the purchase consideration, constituted an annual payment in the nature of income.

In his judgment (1920, 1 K. B., at pp. 714, 715) the learned Judge said:

"There is no law of nature or any invariable principle that because it can be said that a certain payment is consideration for the

transfer of property it must be looked upon as price in the character of principal. A man may sell his property *for a sum which is to be paid in instalments*, and when that is the case the payment to him are not income: *Foley* v. *Fletcher* (28 L.J. Ex. 100; 3 H. and N. 769). Or a man may sell his property *for an annuity*. In that case the Income tax Act applies. Again, a man may sell his property *for what looks like an annuity, but which can be seen to be not a transmutation of a principal sum into an annuity, but is in fact a principal sum* payment of which is being spread over a period, and is being paid with interest calculated in a way familiar to actuaries—in such a case income-tax is not payable on what is really capital: *Secretary of State for India* v. *Scoble* (1903, A.C. 299; 72 L.J.K.B. 617). On the other hand, a man may sell his property *nakedly for a share of the profits of the business*. In that case the share of the profits of the business would be the price, but it would bear the character of income in the vendor's hands: *Chadwick* v. *Pearl Life Insurance Co.* (1905, 2 K.B. 507, 514; 74 L.J.K.B. 671). In such a case the man bargains to have, not a capital sum, but an income secured to him, namely, an income corresponding to the rent which he had before. I think, therefore, that what I have to do is to see what the sum payable in this case really is. *The ascertainment of an antecedent debt is not the only thing that governs*, although in many cases it is a very valuable guide. In this case...the property was sold for a certain sum, and in addition the vendor took an *annual sum which was dependent upon the volume of business done*; this is to say, he took some thing which rose or fell with the chances of the business. When a man does that he takes an income; it is in the nature of income and on that ground I decide this case."

Perhaps the commonest example of a case where a capital sum is converted into income, is where an annuity is purchased. In such a case the annuity is clearly taxable.

This example moreover forcibly illustrates what is the primary test for determining the nature of the payment. The test is whether the capital sum has gone and completely ceased to exist.

Thus in *Foley* v. *Fletcher* (28 L.J. Ex. at p. 109) Watson, B., expressed the test in these words :—

"Annuities mean that where the annuity may be purchased with money the capital is gone and ceases to exist, and consequently the person to be charged is the person receiving the annuity, that is, the yearly sum, year by year. No capital is taxed there, because the principal has been converted into an annuity, and the annuity is chargeable."

As a further corollary of this principle, an important factor to be considered is whether the principal sum is liquidated or unliquidated, *i.e.*, whether there has been any prior ascertainment of a definite sum, as the purchase price.

It will be observed that in *Jones's case* (*supra*) the royalty was of an indeterminate character since it varied with the profits, and this no doubt was a factor taken into consideration in determining that the payments were in the nature of income and not of capital.

Two other cases may usefully be considered in this connection: *Delage* v. *Nugget Polish Co.* (21 T.L.R. 454) and *Chadwick* v. *Pearl Life Insurance Co.* (*supra*).

In *Delage* v. *Nugget Polish Co.*, there was a sale of a manufacturing process in consideration of annual payments for a period of 40 years equivalent to 8 per cent. of the gross sale receipts of the articles manufactured by the process. It was held that the annual payments were in the nature of annuities, and accordingly constituted income. In arriving at this decision, reliance was placed *inter alia* on the fact, as PHILLIMORE, J., put it, that there was

"no first ascertainment of a lump sum as the purchase consideration.

In *Chadwick v. Pearl Life Insurance Co.* the reversion of certain leasehold property, which was sublet at a gross rental of 1,925*l*., but was subject to the payment of a ground rent of 300*l*., so that the net yield from the property to the vendor was 1,625*l*., p.a., was sold for a premium of 1,000*l*., the purchaser at the same time undertaking to pay the vendor in addition an equivalent sum of 1,625*l* p.a. until the expiry of the term, no sum being fixed as the total amount to be paid. It was held that the intention of the transaction was that the vendor should continue to receive as income to the end of the term the same net amount as had been previously received as rent, and that the annual payments to the vendor were payments of an annuity or other annual payment (*i.e.*, income and not capital), from which tax was properly deductible at the source. Stress again was laid on the fact that the agreement did not involve any obligation to pay a fixed sum.

As WALTON, J., pointed out (1905, 2 K.B. at p. 514):

"It is obvious that there will be cases in which it will be very difficult to distinguish between an agreement to pay a debt by instalments and an agreement for good consideration to make certain annual payments for a fixed number of years. In the one case there is an agreement for joint consideration to pay a fixed gross amount and to pay it by instalments; in the other there is an agreement for good consideration not to pay any fixed gross amount, but to make a certain or it may be an uncertain number of annual payments. The distinction is a fine one, and seems to depend on whether the agreement between the parties involves an obligation to pay a gross sum. It is plain that no estimate of any gross amount was involved in the contract between the parties."

MR. JUSTICE WALTON further considered that it made

"no difference whether the contract to make the annual payments is entered into in consideration of money paid or in consideration of property assigned."

And it may be added that neither is "the mere circumstance of a pre-existing debt" the test (per ROWLATT, J., in *Perrin* v. *Dickson*, 1929, 2 K.B. 85, at p. 89) nor the fact that the capital is to continue in a series of equal payments consisting of capital and income indistinguishably: *Secretary of State for India* v. *Scoble* (*supra*). In the latter case only that part of the payment which is determined to represent interest will be taxable.

Reference again may be made to *Perrin* v. *Dickson* (1929, 2 K.B. 85; 1930, 1 K.B. 107). There a policy was taken out to insure the education of a son of the policy holder, and the substance of the bargain, as the Court held it to be, was as follows:—

If the son died before the age of 15, the insurance company was to refund the whole of the premiums paid but without interest; if the son died between the ages of 15 and 21, the company were to refund, but again without interest, the balance of the premiums paid after deducting therefrom any payments already made by the company under the policy, and lastly, if the son lived to the age of 21, the company were to repay the whole of the premiums paid with compound interest at 3 per cent. by seven annual payments.

The premiums that were payable were six annual premiums of 90*l*. each. and the annual sums payable by the insurance company were 100*l*. for seven years, which latter payments were only to be made in the event of the son attaining the age of 21.

It was held that the annual payments which were ultimately made by the company (the son having attained the age of 21) were not annuities, but were re-payments of principal with interest, and that tax was accordingly payable only on such parts of the payments as constituted interest.

The basis of this decision was that the capital represented by the premiums was never lost, since in certain eventualities it was to be returned, but without interest in so far as it had been paid, and in others it was to be returned with compound interest at 3 per cent. The mere fact that the policy did not expressly provide for the return of any premiums in the event of a failure to pay all the premiums, was considered not to alter the nature of the transaction.

This case serves to emphasise the primary principle, which was referred to earlier in this article, that the primary test is whether or not the capital has completely gone and has ceased to exist.

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[IN THE MADRAS HIGH COURT.]

COMMISSIONER OF INCOME TAX, MADRAS

v.

JANAB HAJI MUHAMMAD SADAK KHOYEE SAHIB.

Beasley, C.J., Ramesam and King, JJ.

December 13, 1934.

AGRICULTURAL INCOME—MORTGAGE WITH POSSESSION—INCOME RECEIVED BY MORTGAGEE AND CREDITED TOWARDS INTEREST—WHETHER AGRICULTURAL INCOME—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 4 (3) (viii).

The assessee, in the course of his money-lending business advanced to a zamindar a sum of Rs. 1,50,000. The zamindar was to pay interest at one per cent. per mensem at the end of the year and to pay compound interest on default. Possession of 10 villages was made over to the assessee as security for the loan and he was directed to take possession of 11 other villages after paying off a creditor in whose possession they were. The assessee was to take 5 per cent. of the gross receipts from the properties for establishment charges, and to credit what remained after paying peshkash and meeting repairing charges, towards the interest due to him. If there was any surplus it was to be credited towards principal. The term of the mortgage was ten years. The assessee received Rs. 17,393 from the properties during the year of account and income tax was levied on this sum. He claimed exemption under Section 4 (3) (viii) on the ground that it was agricultural income: Held, *on a reference by the Commissioner, that the income thus received by the assessee was agricultural income, though he had credited it towards interest and it was exempt from tax.* Held further, *that the fact that there was a provision for deduction of five per cent. for expenses and a further provision empowering the mortgagor to ask for inspection of the accounts*

did not make any difference. The fact that a particular rate of interest was mentioned in the deed was also immaterial.

Per RAMESAM, J.—*What one has to look to in such cases is who receives the rent from the tenants. If the mortgagor receives it from the tenants it is agricultural income in his hands and when it passes from his hands it is not. Similarly, if the mortgagee collects it, it is agricultural income in his hands. What use he puts it to is immaterial.*

Cases referred to:

COMMISSIONER OF INCOME TAX, BIHAR & ORISSA *v.* SIR KAMESHWAR SINGH [1934] (1934 I.T.R. 107; A.I.R. 1934 Pat. 107).

COMMISSIONER OF INCOME TAX, MADRAS *v.* IBRAHIMSA ROWTHER [1928] (I.L.R. 51 Mad. 455; 110 I.C. 207; 3 I.T.C. 33).

MUKUND SARUP, *In re* [1928] (I.L.R. 50 All. 496; 107 I.C. 683; 2 I.T.C. 495).

SUBRAHMANYA SASTRIGAL *v.* COMMISSIONER OF INCOME TAX, MADRAS [1926] (2 I.T.C. 152).

Case stated by the Commissioner of Income Tax, Madras, under Section 66 (2) of the Income Tax Act.

Statement of case.—" I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under Section 66 (2) of the Indian Income Tax Act, XI of 1922, (hereinafter referred to as the Act.)

2. The petitioner, Janab Hajee Muhammad Sadak Khoyee Sahib, carried on money-lending business at Vizianagaram within the jurisdiction of the Income Tax Officer, Vizagapatam Circle. In the course of the money-lending business he advanced to the Zemindar of Salur a sum of Rs. 1,50,000 on the mortgage of his lands. According to the mortgage-deed this sum was advanced on 8th November, 1928, on a combined usufructuary mortgage of 21 Jirayati villages and simple mortgage of 26 inam lands and 5 other villages belonging to the mortgagor. The terms of the deed were, that the principal sum should bear interest at 12 per cent. per annum, that the interest due for each year should be paid at the end of that year, that in default of such payment the overdue interest should be capitalised, that this capitalised interest should bear interest at the same rate, that the principal together with any unpaid interest should be repaid before the expiry of ten years from the date of the

document, that in default of such repayment the mortgagee was to be at liberty to file a suit and recover the balance due by the sale of the mortgage properties. He was also at liberty to proceed against the other properties of the mortgagor and also against him personally if the mortgage properties were insufficient to satisfy the claim. The deed further provided that the mortgagee was to get possession of the 21 Jirayati villages, manage the properties, keep accounts, collect the rent from the tenants, take 5 per cent. of the gross collection as management expenses, meet the law charges, and the expenditure on account of all usual and necessary repairs, pay the peshkush and other amounts due to Government; and out of the balance then available he was to appropriate the interest due on the mortgage according to its terms and any surplus thereafter was to be credited towards the principal. Further, under the terms of the deed the mortgagee was accountable only in respect of rents collected by him and was not responsible for uncollected rents; nor was he responsible for any loss or entitled to any profit that might arise providentially or politically; any such additional profit or income collected by him was to be credited towards the mortgage account. The petitioner's rights were limited to the collection of the rents from tenants. Other rights of the land owner, *e.g.*, creation and determination of tenancies, grant of prospecting and mining leases etc., were reserved to the mortgagor. Any payment by the mortgagor during the term of the mortgage, not being less than Rs. 5,000, was to be credited towards principal. Lastly, the mortgage deed ends with the recital, "since we are not able to raise any loan with better terms and less rate of interest than those mentioned in this deed, and on our being advised by our well-wishers that these terms are good we execute this mortgage in our own interest." A translation of the mortgage deed is filed, marked Exhibit A.

3. In accordance with the terms of the mortgage deed the petitioner was put in possession of the 21 Jirayati villages. He has also been recognised, for the time being, as a limited proprietor of these villages, under the Limited Proprietor's Act (IV of 1911). He has ever since been collecting the rents from the tenants with the aid of his own staff, paying the proportionate peshkush fixed by the Collector in respect of these villages and meeting the various charges incidental to the management of the estate. The net amount of the collections available for appropriation towards the interest due on the mortgage for the fasli year ended 30th June, 1930, was Rs. 17,393 according to the books kept by the petitioner.

(A copy of the petitioner's account showing receipts and disbursements for the year is filed, marked Exhibit B). He appropriated this Rs. 17,393 towards the interest due on the mortgage, the total interest due being Rs. 18,000. The Income Tax Officer proposed to include this sum of Rs. 17,393 in the assessment of the petitioner. The petitioner objected and contended that the villages mortgaged to him with possession consisted of agricultural lands, and that the income realised by appropriating either the whole or a portion of the net collections of the rent from these lands towards the interest due on the mortgage should be treated as agricultural income exempt from tax. The Income Tax Officer examined this contention in the light of the terms and conditions of the mortgage deed, and having regard to the fact that what the petitioner was entitled to under the deed was only the fixed amount of interest, *viz.*, Rs. 18,000 and to the fact, that the petitioner was accountable otherwise to the mortgagor in respect of the collections of rent and the disbursements thereof, he held that what was received by the petitioner in this case was interest on the loan assessable to income tax, and not rent from agricultural lands exempt from tax. A copy of the Income Tax Officer's order is filed, marked Exhibit C.

4. The petitioner appealed to the Assistant Commissioner unsuccessfully. A copy of the Assistant Commissioner's order is filed, marked Exhibit D.

5. The petitioner now requires me to refer to the High Court various alleged questions of law said to arise out of the Assistant Commissioner's order. I consider that the only question of law that arises on the facts of this case is the following and I accordingly refer it for the decision of the Court.

Question.—" Whether on the facts of this case the sum of Rs. 17,393, appropriated towards the interest due under the mortgage is exempt under Section 4 (3) (viii) of the Act."

6. In support of his contention that the income in question is agricultural income falling within the scope of the exemption conferred by Section 4 (3) (viii) of the Act, the petitioner relies mainly on the decision of this Court in *T.K.E. Ibrahimsa Rowther* v. *Commissioner of Income Tax, Madras* (51 Mad. 455; 3 I.T.C. 33). But there are two fundamental differences between the petitioner's case and Ibrahimsa Ravuther's. While there was no stipulation as to any interest in *Ibrahimsa Rowther's Case* there is an express stipulation in the petitioner's case for the payment of interest every year at a definite rate, and there are further provisions for

capitalising the unpaid interest and for charging interest on the capitalised sums. Secondly, while in *Ibrahimsa Rowther's Case the entire income accruing from the mortgaged properties was to be taken and enjoyed by the mortgagee with possession* (apparently in lieu of the interest which he would otherwise have got for the user of his money) the petitioner is entitled under the mortgage document to nothing more and nothing less than interest at 12 per cent. on his capital. In other words he could appropriate towards interest only a fixed sum and the balance of the net collection has to be credited towards principal. It is noteworthy that under the terms of the mortgage bond, the petitioner is not in physical possession of any land nor has he the right to create or terminate tenancies. The fact that the interest was stipulated to be paid out of the rent collected from the tenants does not seem to matter because it is merely a provision prescribing the method of payment, a question of ways and means. The facts of this case are fundamentally different from those of *Ibrahimsa Rowther's Case.* In my opinion what is received by the petitioner in this case is interest on the mortgage loan and not rent from agricultural lands exempt under Section 4 (3) (viii) of the Act. The question should be answered accordingly."

A. Krishnaswami Iyer, for the assessee.

M. Patanjali Sastri, for the Commissioner.

This petition having stood over for consideration the Court delivered the following judgment:—

RAMESAM, J.—This matter comes on before us on a reference by the Commissioner of Income Tax under Section 66 (2) of the Indian Income Tax Act. The facts of the case are these. The assessee, Janab Hajee Mohammad Sadak Khoyee Sahib, carries on money-lending business in Vizianagaram within the jurisdiction of the Income Tax Officer, Vizagapatam Circle. In the course of his money-lending business he advanced a sum of Rs. 1,50,000 to the Zamindar of Salur in the Vizagapatam District and obtained a mortgage deed which is Exhibit A, dated the 8th November 1928. The document directs the amount of consideration to be paid to various creditors of the mortgagor. It provides for payment of interest at one per cent. per mensem at the end of the year. If the interest is not fully discharged at the end of the year, overdue interest will be added to the principal and will carry compound interest. The principal amount has to be paid within ten years. At the end of ten years if the amount is not paid the mortgagee may file a suit for sale. Possession of 10 out of 21 Jirayati villages

in Schedule A attached to the document was delivered to the mortgagee. The other eleven villages were then in the possession of the Maharajah of Vizianagaram who was one of the creditors intended to be paid off from the consideration of this mortgage. The mortgagee himself is to pay off the debt and to take possession of those 11 villages. Certain other villages and inam lands were also mortgaged but without possession. So that the document is a mixture of a usufructuary mortgage and a simple mortgage. It is also provided that the mortgagee may take five per cent. of the gross receipts for establishment charges. After meeting the expenses necessary for repairs and after payment of peshkash due to Government the balance is to be credited towards the interest on the bond. If there is any surplus it should be credited towards the principal. No objection is to be raised to the accounts kept by the mortgagee. The peshkash to be paid by the mortgagee is to be the proportionate peshkash. The mortgagor reserves to himself the right of leasing out waste lands and unauthorised cultivations and also resumption of subsequent inams. But the mortgagee is to have the benefit of the additional income so realised. Mining leases may also be issued by the mortgagor but the royalty should go to the mortgagee, and both should have the right of scrutinising the accounts of the mining leases. The mortgagor is to be allowed once a year inspection of the D. C. B. irrigation etc., accounts, the muchilikas and other records that may be maintained by the mortgagee and if the mortgagor requires a copy of any of those documents, it should be given. The mortgagor undertakes to deliver all records such as muchilikas, D.C.B. accounts and other records that are with the Maharajah of Vizianagaram. Whenever the debt is paid off the villages are to be put back in the possession of the mortgagor. Under this document the mortgagee has entered into possession. He has also been recognised as the limited proprietor of the estate under the Limited Proprietor's Act (IV of 1911). In the year of account the assessee received Rs. 17,393, slightly less than one year's interest.

On these facts the Commissioner of Income Tax wanted to assess the income on the ground that it is not agricultural income. The assessee claimed exemption under Section 4 (3) (viii) of the Act. In *Commissioner of Income Tax, Madras* v. *Ibrahimsa Rowther*, a Full Bench of five Judges of this Court held that the profit derived from land under the usufructuary mortgage of that case was exempt from income-tax on the ground that it was agricultural income. In that case the profit of the land was to be

enjoyed by the mortgagee in lieu of interest, no particular rate of interest being specified. Except this fact there is no other difference between that case and this case. However, it is argued before us that the case is distinguishable from this.

It will be convenient first to discuss the matter from first principles. Omitting the case where a cultivator is also the owner of the land which he cultivates and therefore enjoys the produce which is an obvious case, the simplest case for consideration is where a person enjoys the land through his tenants and the tenants pay rent to him either in cash or in kind. In such a case the rent received by the landlord is undoubtedly agricultural income within the meaning of the Act. Though he himself does not cultivate and may get the rent in money, still it is agricultural produce of his land which he receives in one shape or other. Though the point does not arise, I may add that the existence of an intermediary between the landlord and tenant makes no difference. For instance if a Zamindar gives a farming lease of several of his villages to a farmer of revenue the farmer collects rent from the various tenants and after deducting some percentage for his profits pays the balance to the Zamindar. In such a case not only the receipts by the farmer from the tenants but also the receipts by the landlord from the farmer would be agricultural income. The contrary cannot be suggested. In some of the districts in this Presidency especially Ganjam such farming leases usually called *Ijara* or *Mustagari* are very common and in some of the Zamindaris that is the only mode according to which a Zamindar enjoys the income of the Zamindari. So far there is no question of mortgage. But now suppose the owner of the land executes a mortgage of his land to a creditor. If the mortgage is simple, the mortgagor himself collects the income from the land and if he then pays it to the mortgagee, even if he pays in kind, in the mortgagee's hands it is not agricultural income but only interest. Having been once received by the owner of the land as agricultural income, further payments by him would not be in the character of agricultural income. But suppose in such a case instead of the mortgage being a simple mortgage it is a usufructuary mortgage, *i.e.*, possession of the land is transferred to the mortgagee. Thereafter the mortgagee collects the rent from the tenants. In such a case it is held in *Commissioner of Income Tax, Madras* v. *Ibrahimsa Rowther* and also in *Mukund Sarup, In re*, (first part of the judgment at pp. 497 and 498) and in *Commissioner of Income Tax, Bihar and Orissa* v. *Sir Kameshwar Singh* that the income received by the mortgagee from the tenants is agricultural

income and is exempt from tax, the reason for this being apparently that the mortgagee directly collects it from the tenants just as in the case of a simple mortgage the mortgagor collects it from the tenants. In such a case it might be reasonably argued for the Crown that though the mortgagee collects the rent from the tenants directly, the reason for it is that it is strictly the mortgagor's money but the mortgagor authorised him to collect and take it towards his interest and therefore though it may be agricultural income of the mortgagor when the mortgagee takes it in payment of his own interest it is not agricultural income but merely income from money-lending. Though this argument was accepted in the decision reported in *Subrahmanya Sastrigal* v. *Commissioner of Income Tax, Madras*, which was overruled in *Commissioner of Income Tax, Madras* v. *Ibrahimsa Rowther*, it was not accepted in the latter case as well as in *Mukund Sarup, In re*, and in the Patna case. The only reason for this can be that what one has to look to is—who receives the rent from the tenants. If the mortgagor receives it from the tenants it is agricultural income in his hands and when it passes from his hands it is not. Similarly, if the mortgagee collects it from the tenants it is agricultural income in his hands. What use he puts it to is immaterial. I am not now discussing the question whether this is sound or not. Obviously this is the *ratio decidendi* of the three cases mentioned. If so, such *ratio decidendi* applies to all cases of usufructuary mortgage. I am unable to distinguish the case before us from those cases on the ground that in this case there is the provision for a deduction of five per cent. from the gross profits or that the mortgagor may ask for inspection of the documents once a year. So far as the deduction of five per cent. from the gross income is concerned that is the usual expenditure which all landlords have got to incur in collecting the rent, and the mortgagee also has necessarily to incur such expenditure. But instead of deducting the amount of the actual expenditure the parties fixed it at a certain figure, *viz.*, five per cent. of the gross collections. I do not see how this can make a difference for the purpose of argument. In both cases it is either really the money of the mortgagor taken by the mortgagee towards his interest and therefore liable to assessment or income directly collected from the tenants by the mortgagee and hence agricultural income not liable to be assessed. The truth is that it has both these characteristics. But the question is which of these we have to look to. According to the three cases mentioned we have to look more to the fact that the collection is made directly

by the mortgagee from the tenants and not to the fact that he afterwards credits it for his interest. Similarly, the clause relating to inspection can have no bearing on the matter. I can understand that if there is a clause that at the time of the collection a representative of the mortgagor must always follow the Officer of the mortgagee keeping an eye on the collections and preventing any possibility of collusion, such a clause makes a good deal of difference. For in such a case the collection is all made under the mortgagor's supervision though he is not allowed to take it and only the mortgagee takes it. But in this case it is not even that. It seems to me that the fact that in *Commissioner of Income Tax, Madras* v. *Ibrahimsa Rowther*, no particular rate of interest is mentioned is also immaterial. Undoubtedly the profits are taken towards interest. If one is curious enough to know at what rate it works one can easily take the average income and make the arithmetic as to how much it comes to as interest. It is possible that the profits may be slightly varying ; the interest too may be slightly varying but on the average there is no difficulty in describing that the interest works at such and such a rate, and the profits are obviously taken by the mortgagee towards his interest though without mentioning the rate at which it works. I do not see therefore how such a thing can make any difference. If in this case we are to hold that the income is not agricultural income but has only the character of interest, it seems to me that we will be doing so in the face of the three cases cited above. It is not possible to hold in that way without dissenting from them.

At this stage it may perhaps be mentioned that for all practical purposes the mortgagee is the landholder. He is recognised as proprietor. He pays the peshkash to Government. He undergoes all the trouble of going to the tenants and collecting the rent. It is he who has to exchange muchilikas and pattas under the Estates Land Act. If a ryot refuses to exchange muchilikas or to pay rent it is the landholder that has to undertake legal proceedings for those purposes, and not the mortgagor. It will certainly be anomalous to say that he is not a landholder and the income he collects is not agricultural income though on the other hand it is also true that he is doing all this because interest is due to him on a debt.

In my opinion we ought to follow the decision in *Commissioner of Income Tax, Madras* v. *Ibrahimsa Rowther* and leave the Commissioner of Income Tax to appeal to the Privy Council if he chooses.

There is one point in *Mukund Sarup, In re*, which does not arise in the present case. There is a lease back to the mortgagor and the mortgagee takes from the mortgagor ostensibly as rent but really the interest due to him. Sometimes the two may be different. The rent may be much higher than the interest due but the mortgagee takes only the interest due to him. Still it was held in that case that it is agricultural income (*Vide* pp. 498 onwards). Here again the only reason for this can be that the mortgagor pays as lessee to the mortgagee. There is a double relationship of landlord and tenant first between the mortgagor and his tenants and secondly between the mortgagee and the mortgagor. As was pointed out in the earlier part of the judgment that ought not to make a difference. But where under the guise of a lease what is taken is really interest which is different from the rent on the land, one may argue that in such a case the lease is merely a mask and the mortgagee merely gets interest. But this argument did not recommend itself to the learned Judges who decided *Mukund Sarup, In re*. This point does not arise in the present case but I only point out that even in a case beyond the facts of this case it was held that it was agricultural income. In the present case there is no such difficulty. It is not the mortgagor that collects but it is the mortgagee himself that directly collects it from the tenants and there is no lease back to the mortgagor. So this is an *a fortiori* case looked at from the point of view of the *50 All.* case. My answer is that the income is not assessable. Costs to the assessee Rs. 250. Refund ordered of his deposit of Rs. 100.

THE CHIEF JUSTICE :—I agree.

KING, J. :—I agree.

Reference answered accordingly.

[IN THE MADRAS HIGH COURT.]

SOUTH INDIAN INDUSTRIALS, LTD.

v.

COMMISSIONER OF INCOME TAX, MADRAS.

BEASLEY, C. J., RAMESAM, J., and KING, J.

December 12, 1934.

INCOME TAX—LOSSES—ASSESSEE CARRYING ON SEVERAL BUSINESSES—SOME BUSINESSES CLOSED DOWN—LOSS IN RESPECT OF SUCH BUSINESSES, WHETHER CAN BE SET OFF AGAINST INCOME FROM RUNNING BUSINESS—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 2 (4), 10 AND 24.

The assessee company was formed in 1904 to acquire and carry on the businesses of the Chittivalsah Spinning and Weaving Co., the Madras Portland Cement and Tile Works, and certain Cement Works, Rice Mills and Foundry which belonged to Messrs. Arbuthnot & Co. There was another object, namely, to acquire and hold shares in other companies carrying on similar business. In pursuance of the last mentioned object the company had purchased a large number of shares in a jute company and received in the year of account Rs. 1,40,000 by way of dividends. Against this the assessees claimed to set off Rs. 1,59,489, odd, being the loss alleged to have been sustained in the Rice Mills, Cement Works, Brick and Tile Works and the Foundry, including a sum of Rs. 37,015 odd as depreciation. It was found that the assessee company carried on the various businesses till 1925 and that from 1925 onwards it was merely existing to dispose of its various concerns to the best advantage before closing down finally. No trade was done in the year of account in regard to the business in respect of which the set-off was claimed except sales of old stock. But the holding of the shares in the jute company continued. It was contended that the assessee company was not entitled to set off against the dividends the losses sustained in the other concerns inasmuch as the assessee had ceased to carry on the business of those concerns: Held, *on a reference by the Commissioner, that the various concerns acquired by the company were separate businesses; Section 10 of Income Tax Act only dealt with businesses that are being carried on and not businesses which have ceased to be carried on as in this case and the assessee company was not therefore entitled to set off the losses claimed against the income from dividends.*

BEASLEY, C. J.—*Because a company carries on several concerns, it cannot be held that all are one business. A company can*

carry on several distinct and separate businesses and it must always be a question of fact whether those businesses are separate businesses or whether they are so interlocked with the main chief business of the company as to be really one business.

ARUNACHALAM CHETTY *v.* COMMISSIONER OF INCOME TAX, MADRAS [1929] (I. L. R. 52 Mad. 296; 112 I.C. 697; 3 I. T. C. 209) *explained.*

Cases referred to:

COMMISSIONER OF INCOME TAX, MADRAS *v.* SIDDHA GOWDER [1932] (I. L. R. 55 Mad. 818; 137 I. C. 689; 62 M. L. J. 638; A. I. R. 1932 Mad. 375).

COMMISSIONER OF INCOME TAX, MADRAS *v.* BEST & CO., LTD. [1932] (I. L. R. 55 Mad. 832; 63 M. L. J. 15; A. I. R. 1932 M. 434; 138 I. C. 485).

SCALES *v.* GEORGE THOMPSON & CO., LTD. [1928] (13 TAX Cas. 83).

Case stated by the Commissioner of Income Tax, Madras, under Section 66 (3) of the Indian Income Tax Act. (O. P. No. 128 of 1933).

STATEMENT OF CASE.

"I have the honour to refer the following question for the decision of the Hon'ble the Judges of the High Court under Section 66 (3) of the Indian Income Tax Act, XI of 1922 (hereinafter referred to as the Act).

2. The petitioner (hereinafter referred to as the company) is a limited company registered in the year 1904 under the Indian Companies Act, 1882. The main objects of the company as set out in its Memorandum of Association were:

(1) To acquire and carry on the business then carried on by the Chittivalsah Spinning and Weaving Company Limited at Chittivalsah;

(2) To acquire and carry on the business then carried on by the Madras Portland Cement and Tile Works Ltd., at Madras and Bangalore; and

(3) To acquire and carry on the businesses then carried on by Messrs. Arbuthnot & Company, Madras, including their (*a*) Cement Works in Calcutta, (*b*) Rice Mills at Needamangalam and Tiruvalur and (*c*) Reliance Foundry at Madras. A copy of the Memorandum of Association is filed, marked Exhibit A.

In pursuance of its objects the company acquired and carried on the various businesses above mentioned and also certain other businesses, until the year 1923. In this year, the Imperial Bank of India, to which the company owed large sums of money, moved the High Court for the winding-up of the company and as a result the several businesses were, under the orders of the High Court, taken over and conducted by the Official Liquidator till 1925. The liquidation proceedings were then withdrawn by consent and the company tried to resume its activities with an increase of its share capital but apparently without success. From this year onwards, the company was existing, as is admitted in several of its letters (some of which are extracted below) merely to dispose of its various concerns to the best advantage before closing down finally. In its letter to the Income Tax Officer dated 7th February, 1928, the company stated "(1) The stocks and outstandings of the Reliance Engineering Works and Cement works have been handed over to Messrs. Parry & Company from July 1926, (2) Shell quarries to Messrs. C. V. Varadarajulu Chetty and M. Ranganadam Ayyar from 20th August, 1925, (3) Chittivalsah Jute Mills to Messrs. Mcleod and Company, Calcutta, from 18th May, 1926, (4) Tiruvalur and Needamangalam Rice Mills sold to Messrs. Siddick Meanjee Sait & Sons, Coonoor, on 1st December, 1927. On the 13th December, 1929, while submitting its profit and loss statements for the years 1928-29 and 1929-30 the company wrote to the Income Tax Officer as follows: "Please note that we are not doing any business since November 1925 and we have closed all our concerns since then". Again on 17th February, 1930, the company wrote "we are not doing any trade for the following concerns since November 1925 :—

(*a*) City Brick & Tile Works.
(*b*) Madras Cement Works.
(*c*) Needamangalam Rice Mill.
(*d*) Tiruvalur Rice Mill.
(*e*) Reliance Engineering Works.
(*f*) Reliance Rice Mill.
(*g*) Shell Quarries.
(*h*) Vellore Rice Mill."

In reply to a letter from the Registrar of Joint Stock Companies asking why no steps had been taken for the winding-up of the company (having regard to its financial position) the company stated on 7th December, 1931, "the matter of winding-up is under

consideration. Since there are some litigations pending the necessary steps could not be taken immediately."

3. In response to a notice issued under Section 22 (1) of the Act for the assessment of the year 1930-31 (based on the income of the previous year—the year ending 30th September, 1929) the company filed on 31st July, 1931, the return of income with audited Profit and Loss Statements showing a net loss of Rs. 4,988 as shown below :—

		Rs.	A.	P.
General charges including depreciation	...	37,015	0	2
Loss on Vellore Rice Mills	...	71	1	0
,, Cement Works	...	29,608	0	5
,, City Brick and Tile Works	...	13,177	2	10
,, Reliance Rice Mills	...	17,129	6	5
,, Reliance Engineering Works	...	62,488	6	7
Total Loss	...	1,59,489	1	5

Less Profit

		Rs.	A.	P.
Insurance Commission	...	18	4	0
Dividend net	...	1,40,018	4	0
Net Loss	...	19,470	13	5
Deduct income tax on dividends	...	14,482	12	0
Loss returned	...	4,988	1	5

The company applied also for refund of the tax paid on the dividends. The trading account filed for this year showed that the total sales during the year of account amounted to Rs. 2,066 and that there were sales of old stock Rs. 260 in the Madras Cement Works, and Rs. 1,806 in the City Brick and Tile Works, Bangalore. There was no purchase or manufacture of any kind during the year. In fact, it was admitted that no business whatsoever was carried on except the sale of the old stock mentioned above. The loss of Rs. 1,59,489 was mainly due to the payment of interest on money borrowed, depreciation on the machinery and buildings, bad debts written off, loss in revaluation of closing stock due to deterioration, and establishment and miscellaneous charges of the various concerns.

On a close examination of the prior records of the case, the Director's report filed for this year and on the facts set out in paragraph 2 above it appeared to the Income Tax Officer that the company had not carried on any business either during the year of account in question or at any time since November 1925. The Income Tax Officer therefore considered that the loss claimed as a set off against the income from dividends was not really a trading loss. Hence he proposed to disallow it and assess the company to super-tax on its income, Rs. 1,54,493 from dividends. The company objected and contended, amongst other things;

(1) that the Income Tax Officer's finding that it did not carry on business was not correct inasmuch as a company registered under the Indian Companies Act should be supposed to carry on business in law and in fact until it is wound up;

(2) that the statutory meetings were held and the statutory reports were submitted to the Registrar of Joint Stock Companies as usual during the year in question, that therefore it had not ceased to exist; and

(3) that though no fresh stock was manufactured or purchased the company was selling its old stock and therefore it could be said to carry on business.

The Income Tax Officer overruled these objections for the reasons stated in his order. A copy of the Income Tax Officer's order is filed marked Exhibit B.

4. On appeal the Assistant Commissioner confirmed the Income Tax Officer's findings. A copy of the Assistant Commissioner's order is filed, marked Exhibit C.

5. The petitioner then filed an application before me under Section 66 (2) of the Act and required me to state a case and refer 2 questions for the decision of the High Court. I declined to state a case on the ground that no question of law arose. A copy of my order is filed, marked Exhibit B.

6. The petitioner thereupon moved the High Court under Section 66 (3) of the Act and by its order dated 23rd April, 1924, the High Court has directed me to state a case and refer the following question:

"Whether there was sufficient legal evidence to justify the Income Tax Officer's finding that during the year of account the company carried on no business within the meaning of Section 2 (4) of the Income Tax Act, XI of 1922, and that the losses claimed by

the company were of a capital nature and could not be set off against the income from dividends".

7. I take it that the Court proposes to consider whether a certain conclusion of fact was based on evidence. The question whether the evidence was *sufficient*, in other words, whether the right conclusion was drawn from the evidence, does not I believe, arise as a matter of law.

8. First, then, what was the conclusion of fact? For it appears to me that when once that conclusion is plainly stated, the contentions by which the petitioner company seeks to invalidate it will be seen to be irrelevant. The company contended that during the previous year it had carried on the concerns known as the Vellore Rice Mills, the Madras Cement Works, the City Brick and Tile Works, the Reliance Rice Mills and the Reliance Engineering Works, and as a result had incurred losses which must be set off against its income from dividends in the computation of its total income. The Income Tax Officer held, on the contrary, that the company had ceased to carry on the business of these five concerns, and had sustained no "loss of profits or gains" which could be set off under Section 24 or otherwise against its other income. It is evident that if the company as the owner of these concerns, sustained losses by reason of a deterioration in their value or for any other reason, but not as the result of carrying on any business, the losses were of a capital nature and could not affect the amount of the company's income.

9. These are all manufacturing or industrial concerns, and the Income Tax Officer found that during the year no raw material had been purchased and no manufacture had taken place. Sales of old stock had been effected amounting to the negligible figure of Rs. 2,066. These facts were not disputed and there were further various admissions by the company that it had not been carrying on the business of these concerns since 1925. In the face of these facts and admissions, it cannot, in my opinion, be said that the Income Tax Officer arrived at his conclusion without evidence.

10. In its application to the Court the Company had advanced various contentions which, as I have indicated above, appear to me to be irrelevant. It is urged that the company continues to exist, has not been struck off the register of companies under Section 247 of the Companies Act as "not carrying on business or in operation", continued to hold meetings of shareholders and sold stock during the year; and finally, that since the holding of shares is a legitimate activity of the company under Clause (L) of its

Memorandum o Association it should be deemed to be carrying on business so long as it holds shares in the Chittivalsah Jute Mills Company, Limited.

11. Now so far as the sales of stock are concerned, whether these amounted to the carrying on of business appears to be a question of degree and of fact. The facts are that sales took place to the extent of Rs. 260 at the Madras Cement Works, and to the extent of Rs. 1,806 at the City Brick and Tile Works. There were no sales at the Vellore Rice Mills, the Reliance Rice Mills or the Reliance Engineering Works. The total volume of the sales was insignificant. Sales to the extent of Rs. 2,066 are not in my opinion a sufficient ground for holding that business was carried on which resulted in a loss of Rs. 1,59,489. Moreover, the sales took place not in the course of business, but in the course of winding-up; the object was not to carry on business, but to dispose of the assets. I am aware that a trade or business may be carried on in the course of a winding-up, but there are no facts to indicate that that was done here.

12. The other contention appears to be that because the company continued to exist and to hold shares in another company, it follows as a matter of law that the company was carrying on business. That may be true as a proposition of law; I am not concerned to dispute it. A company can be struck off the register if it is "not carrying on business or in operation", which seems to imply that it may be in operation without carrying on business. But let it be assumed that this company, because it continued to be a company, was necessarily carrying on business. It does not follow that it was carrying on the businesses or concerns known as the Vellore Rice Mills, the Madras Cement Works, the City Brick and Tile Works, the Reliance Rice Mills, and the Reliance Engineering Works, and that it thereby sustained a loss of Rs. 1,59,489. No proposition of law can warrant such a conclusion, if the facts are otherwise.

13. In my opinion, therefore there was evidence upon which the Income Tax Officer could find as he did, and the question propounded must be answered in the affirmative. This case is similar to that of the *Mahalakshmi Textile Mills*, decided by this Court and printed at page 83 of Volume VI, Income Tax Cases, the only difference being that the business in that case, in which a loss was said to have been incurred, was one which had not been started, whereas here the losses are claimed in respect of businesses which have been discontinued."

K. V. Krishnaswami Ayyar and *V. Rajagopala Ayyar*, for the assessee.

M. Patanjali Sastri, for the Commissioner.

BEASLEY, C.J.—The question referred to us is:

"Whether there was sufficient legal evidence to justify the Income Tax Officer's finding that during the year of account the company carried on no business within the meaning of Section 2 (4)

of the Income Tax Act, XI of 1922, and that the losses claimed by the company were of a capital nature and could not be set off against the income from dividend."

The assessee-company is a limited company registered in 1904 under the Indian Companies Act. The main objects of the company as set out in its memorandum of association are: (1) to acquire and carry on the business then carried on by the Chittivalsah Spinning and Weaving Company, Limited at Chittivalsah, (2) to acquire and carry on the business then carried on by the Madras Portland Cement and Tile Works, Limited, at Madras and Bangalore and (3) to acquire and carry on the business then carried on by Messrs. Arbuthnot & Company, Madras, including (a) Cement Works in Calcutta (b) Rice Mills at Needamangalam and Tiruvalur and (c) Reliance Foundry at Madras. There is also another object set out in its memorandum of association, namely, to take or otherwise acquire and hold shares in any other company having objects altogether or in part similar to those of the company or carrying on any business capable of being conducted so as directly or indirectly to benefit the company. In pursuance of this last mentioned provision the company purchased a large number of shares in the Chittivalsah Jute Mills Company, Limited, receiving in the shape of dividends during the year of account Rs. 1,40,000. Against that sum the assessees claimed to set off Rs. 1,59,489-1-5 being the total loss alleged to have been sustained on the Vellore Rice Mills, Cement Works, City Brick and Tile Works, Reliance Rice Mills, and Reliance Engineering Works and including an amount of Rs. 37,015-0-2 as depreciation. A net loss of Rs. 19,470-15-5 was thus arrived at from which a sum of Rs. 14,482-12-0 was deducted being income tax on dividends, the loss returned being Rs. 4,988-1-5. In pursuance of its objects the company acquired and carried on various businesses until the year 1923. In that year, the Imperial Bank of India to which the company owed large sums of money applied to the High Court for the winding up of the company and as a result the several businesses were, under the orders of the High Court, taken over and conducted by the Official Liquidator till 1925. Then, by consent, the liquidation proceedings were withdrawn and the company tried to resume its activities with an increase of its share capital but apparently without success. From that year onwards, the Income Tax Commissioner finds that the company was existing merely to dispose of its various concerns to their best advantage before closing down finally, and the letters referred to by him clearly support such a finding. It is clear that, with regard to the businesses in respect of which the assessees claimed to set off the respective losses, no trade was done in them since November 1925 except sales of old stock during the year of account amounting to Rs. 260 in the Madras Cement Works and Rs. 1,806 in the City Brick and Tile Works, Bangalore. No purchase was made or anything manufactured during this year. On the contrary, it is admitted that no business whatsoever was carried on except the sale of the old stock

already referred to. The loss of Rs. 1,59,489-1-5 was made up of payment of interest on moneys borrowed, depreciation on the machinery and buildings, bad debts written off, loss in re-valuation of closing stock due to deterioration and establishment and miscellaneous charges of the various concerns. The company, however, continued to retain its holding of shares in the Chittivalsah Jute Mills Company, Limited, and to that extent the company was undoubtedly carrying on business; and this is not disputed by the Commissioner of Income Tax. What, however, is contested by him is the contention that the assessees are entitled to set off against dividends received from the Chittivalsah Jute Mills Company Ltd., the loss in the other concerns already referred to, as in his opinion the assessees had ceased to carry on the business of those concerns and had sustained no "loss of profits or gains" which could be set off under Section 24 or otherwise against the other income. The assessees both before the Commissioner and before us relied upon the Full Bench decision of this High Court in *Arunachalam Chetty* v. *Commissioner of Income Tax, Madras* (I. L. R. 52 Mad. 296). There a trader having two branches in his trade, *viz.*, a cloth business and a banking business, carried on both, each with borrowed capital and, as the cloth business ended in a loss, he had to close it in 1924 and all that portion of the borrowed capital which was sunk in the cloth business was lost before 1924; and the trader having had to pay interest on that lost capital in 1924-25, the year of assessment, claimed deduction therefor from the assessable profits of his remaining banking business for the year 1924-25. It was held that though the branches were distinct the trade was one and though the lost capital was not available for use in the trade, namely, the banking business, in the year of assessment, the interest paid on it should be deducted under Section 10 (2) (iii) of the Indian Income Tax Act. The facts were that the assessees were a Nattukottai Chetty firm trading under the vilasam of A. L. A. R., their primary business being the usual Nattukottai Chetty business of banking and money-lending. Under the style of Ramaswami & Co., they also traded in piece-goods in Madras. That business was unsuccessful and when closed down in 1924 had sustained a loss of Rs. 11,00,000 odd. It was found by the Commissioner of Income Tax that the business of Ramaswami & Co., was quite separate and distinct from that of A. L. A. R. The Full Bench of which I was a member, however did not agree with this finding and held that it was not a separate business but only a branch of the same business and the finding of principle arrived at is upon that basis and that basis alone. As I was a member of that Bench, I am free to express my opinion which is that the finding of fact of the Income Tax Commissioner ought to have been accepted and that the view of COUTTS-TROTTER, C.J., on this question of fact, with which of course I agreed, was erroneous. I now think that we were mistaken in holding that the piece-goods business which was carried on under a different name and in a different place was

only a branch of the banking business because I am now satisfied that those two businesses were separate and distinct. I think that the examples given by COUTTS-TROTTER, C.J., on page 299 are not quite happy ones. This decision can only be taken as applying the principle to cases where the businesses are not separate. What is the position in the present case? The fallacy underlying the assessees' argument is that because a company carries on several concerns those concerns are all one business, namely, the company's business. That is not so. A company can carry on several distinct and separate businesses and it must always be a question of fact whether those businesses are separate businesses or whether they are so interlocked with the main chief business of the company as to be really one business, for example, a railway company carrying on a steam boat business in connection with its railway. This distinction has been recognised in cases under the Income Tax Acts in England. One of these is *Scales* v. *George Thompson & Co., Ltd.*, (13 Tax Cas. 83). There the respondent was incorporated in 1905 to take over as a going concern the business of George Thompson & Co., ship owners, ship and insurance brokers, underwriters and merchants. As regards their underwriting business the firm had been represented by two of their partners who acted on behalf of the partnership as "names" or members of a syndicate whose credit was used by an underwriting agent in underwriting risks at Lloyd's. The monetary deposit made at Lloyd's in respect of these two partners was transferred to the company, but since Lloyd's will not recognise a company as a name these two partners continued to act as nominees and agents of the company to which all underwriting profits were handed over, the company being responsible for any losses. These profits were brought into the company's accounts with those of the rest of their business. In 1919 one of these nominees retired and in 1920 the other died, whereupon the underwriting business ceased. The company claimed that the underwriting business was a business separate from their other activities and that it should be treated as a separate business in computing their liability. The Special Commissioners allowed their appeal. It was held by the High Court that the question was one of fact and that there was evidence on which the Commissioners could come to their decision. ROWLATT, J., in his judgment says:

"This company carried on the business of underwriting. It also had a fleet of steamers. I cannot conceive two businesses that could be more easily separated than those two................. One does not depend upon the other; they are not interlaced; they do not dovetail into each other, except that the people who are in them know about ships; but the actual conduct of the business shows no dovetailing of the one into the other at all. They might stop the underwriting; it does not affect the ships. They might stop the ships and it does not affect the underwriting",

The same observations can be applied to the present case equally well. The company could cease any one or more of its activities without stopping the others and without getting rid of their share-holding in the Chittivalsah Jute Mills Company Ltd. Similarly, they could get rid of their Chittivalsah Jute Mills shares without stopping any of the other concerns. Cases like the present are dealt with in the *Commissioner of Income Tax, Madras* v. *Siddha Gowder & Sons* (I.L.R. 55 Mad. 818) and *Commissioner of Income Tax, Madras* v. *Best & Co., Madras* (reported in the same volume at page 832). The five concerns in question here were separate businesses and, if those businesses had been carried on during the year of account, the profits and gains of each of them separately would have been arrived at under Section 10 (1) and (2) of the Act after making the allowances given in sub-section (2); and the loss if any, in any one or more of the businesses thus arrived at would, under Section 24 of the Act, be set off against the profits and gains of the more successful businesses arrived at in the same way and the aggregate income computed. But the assessees are not entitled to adopt this course in the present case because Section 10 only deals with businesses which are being carried on and not businesses which have ceased to be carried on as is the case here. For these reasons, the assessees are not entitled to set off the losses as claimed by them which were of a capital nature against the income from dividends. The question propounded must, therefore, be answered accordingly. Costs of the Commissioner of Income Tax Rs. 250. The question in O. P. No. 144 of 1933 is answered in the same way. Costs Rs. 125.

RAMESAM, J.—I agree.

KING, J.—I agree.

Reference answered accordingly.

[IN THE CALCUTTA HIGH COURT.]

IMPERIAL CHEMICAL INDUSTRIES (INDIA) LTD., *In re.*

Costello and Lort-Williams, JJ.

July 19, 1934.

INCOME TAX—BUSINESS EXPENDITURE—MONEY PAID TO AGENT ON TERMINATION OF AGENCY FOR NOT COMPETING WITH ASSESSEE AND AS COMPENSATION FOR LOSS OF AGENCY—WHETHER ALLOWABLE—CAPITAL EXPENDITURE AND BUSINESS EXPENDITURE—TESTS—REFERENCE—FINDING OF COMMISSIONER BASED ON INFERENCES—INTERFERENCE BY HIGH COURT—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 10 (2) (ix), 66 (5).

B. M. & Co. had entered into an agreement of commission agency with P. & Co. on February 9, 1923, which provided that either party may by notice to the other terminate this agreement and six months after the receipt of such notice the agency shall cease. The business

of B. M. & Co. was taken over by the assessees, the Imperial Chemical Industries (India) Ltd. The assessees decided to conduct their own business in India and a notice was given to P. & Co. terminating their agency. The assessees agreed to pay P. & Co. a sum of Rs. 500 per month for a period of 5 years or Rs. 30,000 in lump as compensation, to a certain extent, for loss of the agency, provided P. & Co. agreed to assist the assessees' employees in getting a thorough insight into the working of the business and further agreed not to enter into competition with the assessees for five years. A sum of Rs. 10,000 was thus paid to P. & Co. in the year of account. The assessees claimed that this amount was a business expenditure incurred solely for earning profits and was a permissible deduction under Section 10 (2) (ix) of the Indian Income Tax Act. The Commissioner found that the sum was in part (i) an ex gratia *gift in recognition of past services (ii) payment made with a view to secure future co-operation and (iii) consideration for not competing with the assessees, and was of opinion that no part of the amount was a permissible deduction under Section 10 (2) (ix), the expenditure being in his view a capital expenditure. On a reference to the High Court:*

Held :—*(i) that the Commissioner's finding that the payment was in part an* ex gratia *payment and so on was not a finding of fact but was a conclusion based partly on facts and partly on inferences and it was, therefore, open to the High Court to examine for itself the whole of the facts of the case and to come to its own decision as to the nature of the payments and to answer the question referred on that footing ;*

(ii) that on the facts the payment was not an ex gratia *payment for services rendered, but a payment made for acquiring an enduring benefit which would result in increased profits or gains ;*

(iii) that the expenditure was not of a capital nature but an expenditure falling within Section 10 (2) (ix) inasmuch as the assessees were not nurturing or protecting a new business or purchasing anything in the nature of goodwill but only securing advantages for their undertaking and facilities for future operations, and inasmuch as the payment was made out of the circulating capital and did not result in any new asset or addition to the fixed capital of the assessees. It is not possible to lay down any hard and fast rule or to enunciate any rigid and scientific principle which can be applied as a criterion for deciding whether any particular payment is in the nature of capital expenditure or revenue expenditure. Whether or not the payment was one of a kind which would be made 'once and for all' by way of a lump sum is often a material consideration but not a conclusive test. Whether the expenditure involved any withdrawal of capital is another test and a third test suggested is what would be forthcoming in a liquidation as a result of the expenditure which has been made. But the question is one of fact to be decided upon the facts of each particular case. Where an expenditure is made not only once and for all but with a view to bringing into

existence an asset or an advantage for the enduring benefit of a trade there is good reason for treating such an expenditure as properly attributable not to revenue but to capital.

Cases referred to:

AMERICAN THREAD COMPANY *v.* JOYCE [1912] (6 Tax Cas. 1; 28 T.L.R. 233; 106 L.T. 171).

ANGLO-PERSIAN OIL COMPANY (INDIA), LTD., *In the matter of* [1933] (1933 I.T.R. 129; I.L.R. 60 Cal. 843; 37 C.W.N. 430; A.I.R. 1933 Cal. 777).

ANGLO-PERSIAN OIL COMPANY, LTD. *v.* DALE [1932] (1 K.B. 124; 100 L.J.K.B. 504; 145 L.T. 529; 75 S.J. 408; 16 Tax Cas. 253).

ATHERTON *v.* BRITISH INSULATED AND HELSBY CABLES, LTD. [1925] (1 K.B. 421).

BRITISH INSULATED AND HELSBY CABLES *v.* ATHERTON [1926] (A.C. 205).

COMMISSIONERS OF INLAND REVENUE *v.* FRANK BERNARD SANDERSON [1921] (8 Tax Cas. 38).

GOLDEN HORSE SHOE (NEW), LTD. *v.* THURGOOD [1934] (1 K.B. 548; 18 Tax Cas. 280; 150 L.T. 427).

GRAMOPHONE AND TYPEWRITER, LTD. *v.* STANLEY [1908] (2 K.B. 89; 5 Tax Cas. 358; 77 L.J.K.B. 834; 99 L.T. 39).

HANCOCK *v.* GENERAL REVERSIONARY AND INVESTMENT CO. [1919] (1 K.B. 25; 88 L.J. K.B. 248; 119 L. T. 737; 7 Tax Cas. 358).

MALLETT *v.* STAVELEY COAL & IRON CO. [1928] (2 K.B. 405; 13 Tax Cas. 772).

SMITH *v.* INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND & WALES [1914] (3 K. B. 674; 83 L.J. K.B. 1721; 111 L.T. 848; 6 Tax Cas. 477).

SMITH & SON *v.* MOORE [1921] (2 A.C. 13).

TATA IRON & STEEL CO. LTD. *v.* CHIEF REVENUE AUTHORITY, BOMBAY [1923] (47 Bom. 724; 50 I.A. 212; 28 C.W.N. 307; 45 M.L.J. 295; 1 I.T.C. 206).

VALLAMBROSA RUBBER CO. *v.* FARMER [1910] (5 Tax Cas. 529).

Case stated by the Commissioner of Income Tax, Bengal, under Section 66 (1) of the Indian Income Tax Act (XI of 1922), Ref. No. 10 of 1933.

STATEMENT OF CASE.

Under Section 66 (1) of the Income Tax Act I refer on my own motion, for the judgment of the High Court, the question of law arising in the course of proceedings under Section 33 of the Act in regard to 1931-32 assessment of Imperial Chemical Industries (India) Ltd., *viz.*:—

"Whether payments amounting to Rs. 10,000 described by the assessee as compensation to ex-agents, but found in fact to be:—

(*a*) in part, *ex gratia* gift made in recognition of past services;

(*b*) in part, payments with a view to secure willing co-operation in the course of taking over the agency business; and

(*c*) in part, payment as consideration for an undertaking not to compete with the assessees' business after the termination of the agency:

are or are not expenditure allowable in charge under Section 10 (2) (ix) of the Act."

2. Your Lordships decided in *In the matter of the Anglo-Persian Oil Company (India), Ltd.* (1933 I.T.R. 129) on the 8th February, 1933, that a certain payment "as compensation for loss of agency whereby that company relieved itself of future annual payments of commission chargeable to revenue account," was an allowable charge.

In referring that case the Commissioner accepted the company's description of the payments without criticism or detailed examination. The decision is represented by the present assessee to cover the facts of his case. I am satisfied that it does not; but the issue is of general importance and frequent recurrence, and it is very desirable that it should be fully determined with the authority of your Lordships' judgment.

3. FACTS.—The payments in issue related to two agencies, one at Madras and one at Colombo.

The assessee succeeded Messrs. Brunner Mond and Company (India) Ltd., in 1928-29. That company had concluded on 9th February, 1923, with Messrs. Parry and Company of Madras a *del credere* commission agency agreement. The agreement included the following material clauses:—

"14. Either party may by notice to the other terminate this agreement and six months after the receipt of such notice this agreement and the agency hereby constituted shall cease except so far as concerns the rights of either party in connection with acts, matters or things done or matters to be done before such termination.

15. After the determination of this agreement the Agents shall have no claim against the principal for any commission in respect of any subsequent sales made by the principal within the Agents' districts to customers originally introduced to them by the Agents."

The business of which the assessee is one subsidiary was re-organised in 1927 on the constitution of the parent company—Imperial Chemical Industries Ltd. (United Kingdom). It was then decided that the concern would conduct its own business throughout India. Messrs. Parry and Company were given a preliminary intimation of this policy in a letter of 4th February, 1927 (copied as Annexure A). This letter states *inter alia* that

the agreed notice would be given in due course; that the agents had consented to the assessee setting up his organisation during the currency of the notice (though the agents would draw full commission throughout); that possibly the agents would be given the agency at certain outports for some further period; and "As compensation to a certain extent for the loss of our agency we should be willing to pay you the sum of Rs. 500 per month for 5 years to be reckoned from the date of the expiry of the notice terminating the agency, or a lump sum of Rs. 30,000 if you preferred it: provided that you would agree not to enter into competition with us in the products you are now handling on our behalf during the five years referred to. This would not preclude you from continuing to sell paint, for which we understand you hold other agencies than ours............"

The letter concludes with the assessee's proposal that his own employees would, meantime, be assisted towards getting a thorough insight into the working of the business prior to taking over, and thanked the agents for "The very kind reception you have given to our proposals and for the assistance you are prepared to render to facilitate the opening of our own offices."

On 8th February, 1927, the agents replied accepting the proposals (in the letter copied as Annexure B), including their appreciation of "the friendly and generous attitude which has guided these negotiations."

By letter of 14th June, 1927 (copied as Annexure C), the assessee gave due formal notice of termination of the agreement with effect from 31st December, 1927.

By agreement with the assessee the agents debited in their running account of 28th December, 1927, the lump sum of Rs. 30,000; but the assessee has distributed the charge in his revenue accounts passing Rs. 4,500 through the books on 30th September, 1928, and Rs. 6,000 annually since then; so that Rs. 6,000 falls in the accounts for the year ending 30th September, 1930, under the present assessment.

It may be noted for information that the commission (gross) payable to Messrs. Parry & Company had been approximately :—

	Rs.
1925	26,300
1926	31,650
1927	34,750

4. There was a similar agreement with Messrs. Hayley and Kenny of Colombo, dated 16th February, 1923; and it included the clauses quoted above. The preliminary notice to them was given by letter of 12th March, 1929 (copied as Annexure D), which stated *inter alia* that "as compensation for the loss of this Agency and an indication of our appreciation we should pay you a sum of Rs. 20,000 on the understanding that you would not handle our products from competitive sources without

previously obtaining our permission, which would not be unreasonably withheld; also that you would render us every possible assistance in establishing our own office in Colombo; and it was agreed that you would permit one of our European Assistants to work in your office for such period as we desire, probably 6 months, in order to become thoroughly acquainted with the buyers of our products and with depots that have been opened."

The agent replied by letter, dated 21st March, 1929 (copied as Annexure E), accepting the proposals and noting *inter alia*: "We take this opportunity of thanking you for offering us the sum of Rs. 20,000 in compensation for the loss of the Agency ....We agree not to handle your products from competitive sources without your permission, which we note with thanks, would not unreasonably be withheld."

By letter of 15th June, 1929, the assessee gave due formal notice of termination of the agency with effect from 31st December, 1929, as upon the terms laid down in the above correspondence.

It may be mentioned that there was a subsequent letter of 3rd December, 1929, in which the agents, being informed that the assessee's manager would arrive on 5th January, 1930, stated that they would have pleasure in giving him all assistance to take up the threads of their business in Ceylon.

The sum of Rs. 20,000 appears to have been debited by the agents in their accounts with the assessee on some date prior to 1st January, 1930. The assessee has passed Rs. 4,000 through his books annually on this account, beginning with 30th September, 1930, under the present assessment. It may be noted for information that the Agent's receipts of commission (gross) were approximately :—

	Rs.
1928	9,300
1929	9,600
1930	4,070

the latter sum being allowed for 4 months of the year after the formal expiration of the agency.

5. (*a*) The amount thus charged in this period in respect of the two agencies totalled Rs. 10,000.

It appears that the Agents held and kept up stocks of the assessee's goods : and in the course of the change over of the business, transferred the stocks to the assessee as convenient.

(*b*) Assessee's case throughout the assessment and in his application to the Commissioner for revision was as follows (quoted from his letter of 5th October, 1931) :—

"We still contend that this compensation is from our point of view an allowable business expense. The payment of the compensation depended on an agreement that the ex-agent would not compete with our products and this agreement we

argue changed the payment from an *ex gratia* one to a definite business one".

No other ground was raised within the time permissible to the assessee but it appears that eventually my predecessor decided to leave the case to await the decision of the High Court in the *Anglo-Persian* case mentioned above. It remains open to me to decide the case upon its proper merits. The assessee has been in no way prejudiced.

6. It is not my intention to question in any way the particular year in which assessee chose to charge his accounts with the payments of these sums. He could have charged within the present account period the whole of Rs. 20,000 of the Colombo payment—an amount in excess of the actual allocation of 10,000. So far as this question might arise, I agree to his assigning any such charge as was at any time admissible, over such series of years as he finds convenient for his own account purposes; so that he may be in no way prejudiced in this regard.

7. OPINION OF THE COMMISSIONER.—The United Kingdom case of *Anglo-Persian Oil Company* v. *Dale* (16 T. C. 253)—which I agree would cover the provisions of the Indian Act on the point decided—had to do with the payment of compensation on the termination of a binding agreement which still had several years to run. That payment was in strict and proper use of the word "compensation." It seems to me a misuse of the word to apply it to payments which were never in any way enforceable, or which were for the future benefit of the assessee's business. At any rate, whatever may be the right word to be used, it is clear that the present assessee's payments are not within that decision; and the case is only relevant so far as its *ratio decidendi* may give guidance for a decision on the present differing facts.

It may be noted that even in this case LORD ROMER at page 274 points out that it would have been open to the Commissioners to come to findings of facts about just what the payment comprised; but the case was decided on the Commissioners' apparent acceptance of its being wholly "compensation" in the true sense.

8. I may venture to include here, as summarising its *ratio decidendi* the following quotations :—

LORD LAWRENCE (page 269) :

"...........Where a trader in order to effect a saving in his working expense dispenses with the service of a particular agent or servant and makes a payment for the cancellation of the agency or service agreements, such a payment is properly chargeable to revenue, as it does not involve any addition to or withdrawal from fixed capital."

ROWLATT, J. (page 260) :

"...........The circumstance that the payment is a lump sum payment in one year in lieu of annual payments in a number of years does not in any way prevent it from being a deductible

expense.........The question is not merely getting rid of an onerous contract—if it is an onerous contract for payment of wages or commission which are chargeable to revenue account, it is impossible to suggest that this is a reason for saying that this is a capital expenditure.".........(Unless you are at the same time acquiring or improving a capital asset)..."There is no evidence, and it was not suggested before the Commissioners as I understand it, that any part of this sum was paid for the purpose of acquiring anything analogous to goodwill on the part of these people."

9. (*a*) Now the first question arising is whether such part of the payments in issue as may be attributable to facilitating the taking over would be an admissible charge.

I have not been able to trace a direct decision on this point but I am guided by the decisions or the principles enunciated in the following cases, as well as in *Dale's Case* cited above :—

Granite Supply Association v. *Kitton* (5 T. C. 168). Expenditure for transferring business premises is not an expense "incurred for the year in which the thing is done, but for the general interest of the business" ; and is not a proper deduction from income.

Savill Brothers, In re, (4 T.C. 430). A brewer's expenditure over obtaining new licenses (including compensation to ex-licensees) "was of the nature of an investment of money" ; and not deductible.

McTaggart, In re, (10 T. C. 17). Premium for renewal of a lease was a capital expense as being "in ordinary commercial language and in ordinary commercial usage, capital expense and not a revenue one."

Staveley Coal Co.'s Case (13 T. C. 772). Costs of acquiring a lease or of getting rid of an unremunerative lease are alike capital.

Rees Roturbo's Case (13 T. C. 366). (Mr. Justice ROWLATT's distinction of fixed and circulating capital).

I do not think there is much guidance from the general discussion in *Noble's Case* [11 T. C. at page 413]. But there is in *Helsby Cables Case* [10 T. C., notably LORD ATKINSON's at page 194 and in the review of earlier cases by LORD CHANCELLOR CAVE on the previous page]. In India the nearest case seems to be *Alagannan Chetty's* [3 I. T. C. 44] : Money paid to get a contract (not to work it) was held to be capital.

In my view, the agencies having been properly determined by valid notice are out of consideration altogether. The assessee falls to be considered as building up his own trade connections in replacement of the agency, and any payments towards that object are analogous to the acquisition of goodwill and are on capital account.

(*b*) The second question is whether such part as may be attributable to restraint of future competition would be an admissible charge.

I think this is to be determined by the same principles as above: and it seems to be particularly close to the Madras case quoted. I think it would not be an admissible charge.

(*c*) As regards such part as was *ex gratia* reward for past services, clearly that could not be expenditure incurred for the purpose of earning profits.

Hence, in my opinion, no part of the payments in issue should be allowed as a charge.

10. Apportionment of amounts in issue. It is not necessary that I should trouble your Lordships with the allocation that will be made, if necessary, against these separate objects included in the lump sum payment. It was clearly held in *Sun Insurance Case* [6 T.C.: particularly the LORD CHANCELLOR at page 75] that this is simply an issue of fact. It seems desirable, however, that this should be determined before the submission of the case: and it is also possible that the determination may assist an appreciation of the separation which I have made.

With regard to the practical difficulty of making any estimate, LORD MACKENZIE's remarks in *Macpherson's Case* [6 T.C. 115] are very exactly in point. The assessee has stated that he is unable to suggest anything to assist me. He has however, allowed me access to all correspondence with the ex-agents.

(*a*) As to the proportion that was *ex gratia*: it might seem unlikely that there would be any large payments of such a character, but generous rewards for good service are by no means an uncommon feature of business, particularly from the Directors and Managers of great and prosperous public companies towards employees and agents with whom they have had direct contact and satisfactory dealings. Two companies whose cases have been before the Calcutta High Court, *viz.*, *Turner Morrison* and *Shaw Wallace*, specifically represented that very much larger sums were *ex gratia* payments to them "in the nature of a present." (I need not discuss the doubts expressed about this in their cases, or the subsequent comments of the Privy Council on the latter of them).

(*b*) As to the proportion in restraint of future competition: in the Colombo case it was particularly stated that permission to deal in rival products would not be unreasonably withheld. I have also seen correspondence with the Madras agents in regard to certain products which they wished to handle; and I take into consideration the known position of assessee's products in the market generally. I do not think this consideration had very great weight in the whole matter.

(*c*) As to the proportion towards facilitating the transfer, I think a fair basis may be taken as one-third of the gross annual commission previously paid, which is approximately 30 per cent. of the whole agreed sum.

I would allocate 60 per cent. of the payments to *ex gratia* rewards, 10 per cent. to restraint of future competition and 30 per cent. towards facilitating the transfer.

11. The statement of the case is submitted for your Lordship's judgment."

Mr. Isaacs and *Mr. Clough*, for the assessees.

Mr. A. K. Roy (*Advocate-General*) and *Dr. Radha Bonode Pal*, for the Income Tax Authorities.

JUDGMENT.

COSTELLO, J.—This matter comes before us by way of a case stated by the Commissioner of Income Tax on his own motion under Section 66 (*1*) of the Income Tax Act (XI of 1922). The Commissioner has referred for the judgment of the Court a question of law arising in the course of proceedings under Section 33 of the Act in regard to the 1931-32 assessment of Imperial Chemical Industries (India), Ltd. The Commissioner of Income Tax has put the matter in this form: "Whether payments amounting to Rs. 10,000 described by the assessees as compensation to ex-agents, but found in fact to be: (*a*) in part, *ex gratia* gift made in recognition of past services, (*b*) in part, payments with a view to secure willing co-operation in the course of taking over the agency business; and (*c*) in part, payments as consideration for an undertaking not to compete with the assessees' business after the termination of the agency—are or are not expenditure allowable in charge under Section 10 (*2*) (*ix*) of the Act."

Section 10 (*2*) deals with the manner in which profits or gains are to be computed for the purpose of assessment of income tax, and it contains an enumeration of the allowances which the assessees shall be entitled to make or, to put it more accurately perhaps, the deductions which the assessees are entitled to make before a net sum is arrived at upon which income tax becomes payable, and in sub-paragraph (*ix*) we find as a permissible allowance or deduction "any expenditure, not being in the nature of capital expenditure, incurred solely for the purpose of earning such profits or gains." The Court is, therefore, asked by the Commissioner of Income Tax to decide in effect whether the payment of Rs. 10,000 was one which could be taken into account by way of deduction for the purpose of arriving at the net sum upon which income tax would be payable in respect of the tax year 1931-32.

This matter originally came before the Court on the 12th February, 1934. Some question was then raised by learned Counsel on behalf of the assessees as to whether or not he might be able to avail himself of the provisions contained in sub-paragraph (*viii-a*) of Section 10 (*2*). That sub-paragraph makes allowable a deduction for any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend, if it had not been paid as bonus or commission: provided that the amount of the bonus or commission is of a reasonable amount with reference to: (*a*) the pay of the employee and the conditions of his service, (*b*) the profits of the business for the year in question, and (*c*) the general practice in similar businesses. Mr. Isaacs, appearing on behalf of the assessee

on the 12th February, 1934, invited the Court to refer the matter back to the Commissioner of Income Tax in order that he might determine the findings of fact necessary for the purpose of enabling the Court to form an opinion as to the applicability of sub-paragraph (*viii-a*), and on this occasion we have had before us the supplementary statement of the case, as it is described, made under Section 66 (*4*) of the Act. In that statement the Commissioner of Income Tax has expressed certain opinions and indeed arrived at certain conclusions of fact, upon the question whether the sum of Rs. 10,000 would be an admissible deduction under sub-paragraph (*viii-a*). The Commissioner of Income Tax points out in his supplementary statement of the case that that sub-paragraph or as he calls it sub-section, only came into operation on the 4th April, 1930, and consequently, as it follows that only expenditure of the kind contemplated by the sub-paragraph which has been incurred since the 4th April, 1930, would fall within the operation of this sub-paragraph any expenditure incurred before that date had not, at the time when made, a deductible character and no subsequent change in law could give it such a character.

We do not think it necessary for the purpose of disposing of this matter to express any opinion as to whether that view of the Commissioner of Income Tax was correct or not, nor indeed to express any opinion at all as to whether or not the sum with which we are here concerned could properly be treated as an admissible deduction under the provisions of sub-Section (*viii-a*), because in our opinion the matter can be decided as originally asked by the Commissioner of Income Tax, solely with reference to the provisions of sub-Section (*ix*) of Section 10 (2) of the Act.

In order to make it quite clear what the point is which has been submitted for determination by the Court, it is necessary that I should recite the relevant facts which show the circumstances in which, and the conditions under which, the payment in question came to be made by the assessees. The Commissioner points out that the payments in issue relate to two agencies of the assessees, that is, of the Imperial Chemical Industries (India), Ltd., one at Madras and the other at Colombo. It appears that the assessees succeeded a company known as Messrs. Brunner Mond and Company (India), Ltd., in the tax-year 1928-29. I presume the Commissioner of Income Tax means that the business of Messrs. Brunner Mond & Co., was taken over by or absorbed into the undertaking known as Imperial Chemical Industries (India), Ltd. Messrs. Brunner Mond & Co., on 9th February, 1923, had entered into what is described as a *del credere* commission agency with a firm known as Parry and Company, Madras. That agreement contained *inter alia* the following clause : Either party may, by notice to the other, terminate this agreement, and six months after the receipt of such notice this agreement and the agency hereby constituted shall cease except so far as concerns the rights of either party in connection with acts, matters or things done or matters to be done before such termination." That was

Clause 14 of the agreement, and Clause 15 was as follows: "After the determination of this agreement the agents shall have no claim against the principal for any commission in respect of any subsequent sales made by the principal within the agents' districts to customers originally introduced to them by the agents."

The Commissioner of Income Tax puts the history of the matter in this way: "The business of which the assessee is one subsidiary was re-organised in 1927, on the constitution of the parent company, Imperial Chemical Industries, Ltd., (United Kingdom). It was then decided that the concern would conduct its own business throughout India. Messrs. Parry and Company were given a preliminary intimation of this policy in a letter of 4th February, 1927 (copied as Annexure A). This letter states *inter alia* that the agreed notice would be given in due course: that the agents had consented to the assessee setting up his organisation during the currency of the notice (though the agents would draw full commission throughout); that possibly the agents would be given the agency at certain outports for some further period; and "As compensation to a certain extent for the loss of our agency we should be willing to pay you the sum of Rs. 500 per month for 5 years to be reckoned from the date of the expiry of the notice terminating the agency, or a lump sum of Rs. 30,000 if you preferred it, provided that you would agree not to enter into competition with us in the products you are now handling on our behalf during the five years referred to. This would not preclude you from continuing to sell Paint; for which we understand you hold other agencies than ours......"

The letter concludes with the assessee's proposal that his own employees would, meantime, be assisted towards getting a thorough insight into the working of the business prior to taking over, and thanked the agents for "the very kind reception you have given to our proposals and for the assistance you are prepared to render to facilitate the opening of our own offices."

On 8th February, 1927, the agents replied accepting the proposals (in the letter copied as Annexure B), including their appreciation of "the friendly and generous attitude which has guided these negotiations."

By a letter of 14th June, 1927 (copied as Annexure C), the assessee gave due formal notice of termination of the agreement with effect from 31st December, 1927.

By agreement with the assessee the agents debited in their running account of 28th December, 1927, the lump sum of Rs. 30,000; but the assessee distributed the charge in his revenue accounts, passing Rs. 4,500 through the books on 30th September, 1928, and Rs. 6,000 annually since then: so that Rs. 6,000 falls in the accounts for the year ending 30th September, 1930, under the present assessment; that is of course the assessment for the tax-year 1931-32. Then the Commissioner of Income Tax says: "It may be noted for information that the commission (gross) payable to Messrs. Parry and Company had been approximately

		Rs.
1925	...	26,300.
1926	...	31,000.
1927	...	34,750."

Then the Commissioner deals with the position as between Imperial Chemical Industries (India) Ltd., and their Ceylon agents. He says: "There was a similar agreement with Messrs. Hayley and Kenny of Colombo, dated 16th February, 1923; and it included the clauses quoted above. The preliminary notice to them was given by a letter of 12th March, 1929 (copied as Annexure D), which stated *inter alia* that "as compensation for the loss of this Agency and an indication of our appreciation we should pay you a lump sum of Rs. 20,000 on the understanding that you would not handle our products from competitive sources without previously obtaining our permission, which would not be unreasonably withheld; also that you would render us every possible assistance in establishing our own office in Colombo; and it was agreed that you would permit one of our European Assistants to work in your office for such period as we desire, probably 6 months, in order to become thoroughly acquainted with the buyers of our products and with depots that have been opened."

The agent replied by letter, dated 21st March, 1929 (copied as Annexure E), accepting the proposals and noting *inter alia*: We take this opportunity of thanking you for offering us the sum of Rs. 20,000 in compensation for the loss of the Agency......We agree not to handle your products from competitive sources without your permission, which, we note with thanks, would not unreasonably be withheld."

By a letter of 15th June, 1929, the assessee gave due formal notice of termination of the agency with effect from 31st December, 1929, as upon the terms laid down in the above correspondence. Then the Commissioner says: "There was a subsequent letter of 3rd December, 1929, in which the agents, being informed that the assessee's manager would arrive on 5th January, 1930, stated that they would have pleasure in giving him all assistance to take up the threads of their business in Ceylon."

The sum of Rs. 20,000 appears to have been debited by the agents in their accounts with the assessee on some date prior to 1st January, 1930. The assessee passed Rs. 4,000 through his books annually on this account, beginning with 30th September, 1930, under the present assessment. It may be noted for information that the agent's receipts of commission (gross) were approximately :—

		Rs.
1928	...	9,300.
1929	...	9,600.
1930	...	4,070.

the latter sum being allowed for 4 months of the year after the formal expiration of the agency.

Then comes the material statement inthe case with regard to the total sum of Rs. 10,000. In paragraph 5 the Commissioner says: "The amount thus charged in this period in respect of the two agencies totalled Rs. 10,000.

It appears that the Agents held and kept stocks of the assessee's goods: and in the course of the change-over of the business, transferred the stocks to the assessee as convenient. Then in paragraph 5 (*b*) the Commissioner says: "The assessee's case throughout the assessment and in his application to the Commissioner for revision was as follows (quoted from his letter of 5th October, 1931):—

"We still contend that this compensation is from our point of view an allowable business expense. The payment of the compensation depended on an agreement that the ex-agent would not compete with our products and this agreement, we argue, changed the payment from an *ex gratia* one to a definite business one."

Then he says: "No other ground was raised within the time permissible to the assessee; but it appears that eventually my predecessor decided to leave the case to await the decision of the High Court in the *Anglo-Persian Case* mentioned above." The Commissioner here refers to his statement in paragraph 2 of the case where he says:—

"Your Lordships decided in the matter of the *Anglo-Persian Oil Company* (*India*), *Ltd.*, on the 8th February, 1933, that a certain payment 'as compensation for loss of Agency whereby that Company relieved itself of future annual payments of commission chargeable to revenue account,' was an allowable charge.

"In referring that case the Commissioner accepted the Company's description of the payment without criticism or detailed examination. The decision is represented by the present assessee to cover the facts of his case. I am satisfied that it does not; but the issue is of general importance and frequent recurrence, and it is very desirable that it should be fully determined with the authority of your Lordships' judgment.

"Now, it is to be observed, therefore, at the outset that the Imperial Chemical Industries (India) Ltd., as the assessees, were contending that the payment of the sum of Rs. 10,000 ought to be taken as an allowable business expenditure, because the payment depended on an agreement and was not in the nature of *ex gratia* payment to their former agents. The learned Commissioner of Income Tax has thought fit to split up the sum of Rs. 10,000 into three parts, and to allocate each of those parts to certain objects. As I have already pointed out, he says that it has been found in fact that the sum of Rs. 10,000 was (*a*) in part, an *ex gratia* gift made in recognition of past services, (*b*) in part, payment with a view to secure willing co-operation in the course of taking over the agency business, and (*c*) in part, payment as consideration for an undertaking not to compete with the assessees' business after the termination of the agency. The learned

Commissioner has apparently based that view upon the interpretation which he himself has placed upon the letters which passed between the assessees or rather Messrs. Brunner Mond & Co., their predecessors and Messrs. Parry & Co., of Madras, and the correspondence between Messrs. Brunner Mond & Co., and Messrs. Hayley and Kenny of Colombo.

As regards what I will call the Madras Agency correspondence, we find in the letter of 4th February, 1927, which is Annexure "A" the result of the negotiations between the company and their Madras agent, summarised as follows:—

(1) You will allow any members of our European staff, whom we may detail for the purpose, to work on our business in your office during the continuance of the agency.

(2) As the time approaches when we consider that our staff will shortly be in a position to run the business independently, we shall give you the six months' notice required under your Agency agreement.

(3) You will not oppose the opening of our office or offices in Madras or elsewhere during the period of the notice. This will, of course, not affect your position as regards commission, which will be payable until the notice expires.

Paragraphs (4) and (5) are not very material, but in paragraph (6) it is stated :—

"We informed Mr. Wood that as compensation to a certain extent for the loss of our agency, we should be willing to pay you the sum of Rs. 500 per month for five years to be reckoned from the date of the expiration of the notice terminating the agency or a lump sum of Rs. 30,000 if you preferred it, provided that you would agree not to enter into competition with us in the products you are now handling on our behalf during the five years referred to."

The last paragraph contained the following words quoted by the Commissioner in his summary of events :

"We wish you to accept our sincere thanks for the very kind reception you have given to our proposals, and the assistance you are prepared to render to facilitate the opening of our own offices."

In answer to that letter, Messrs. Parry & Co., wrote on the 8th February, 1927, as follows :—

"We accept your proposals and terms as recorded in your letter under reply, and give you our assurance that you will receive from us all the co-operation and help which it is possible for us to give to your representatives before the transfer is made, and to your company thereafter."

In the Colombo Agency correspondence Messrs. Brunner Mond & Co., in their letter of the 12th March, 1929, recording the result of the verbal negotiations which had taken place say as follows :—

"We confirm the conversation which took place between Messrs. Hayley and Simpson and Mr. Nicholson and the undersigned

on the 7th instant when we advised that owing to the necessity for the development of our interests all through the near and the far East, it was essential that we should open our own office in Ceylon in the near future. It was placed on record that this in no way reflected on your handling our agency in the past as we were extremely satisfied with the attention you have given to our interest and the willingness you showed at all times to co-operate with us in developing the sales of the products entrusted to your charge. It was agreed that as compensation for the loss of this Agency and an indication of our appreciation we should pay you a sum of Rs.20,000 on the understanding that you would not handle our products from competetive sources without previously obtaining our permission which would not be unreasonably withheld, also that you would render us every possible assistance in establishing our own office in Colombo and it was agreed that you would permit one of our European Assistants to work in your office for such period as we desire, probably 6 months, in order to become thoroughly acquainted with the buyers of our products and with depots that have been opened. It was also agreed at your special request that the amount fixed as compensation should be paid to you when our European Assistant was attached to your office."

Those proposals were accepted by the Colombo Agents in their letter of the 21st March, 1929. It will be seen from that correspondence that the real position was that Messrs. Brunner Mond & Co., as predecessors of Imperial Chemical Industries (India), Ltd., were making an arrangement whereby instead of conducting their business and providing for the sale of their products through agency firms in Madras and Colombo, they would in future conduct their business through their own officers and their own staff in those two centres respectively. In brief, the position was that although Messrs. Brunner Mond & Co., were entitled to put an end to the agency agreement upon a bare six months' notice and nothing more, they, by the arrangement they had made, secured for themselves certain advantages which otherwise might not have enured to them, if they had merely exercised their strict legal right and terminated the agencies and had done nothing more. The advantages which were obtained may be summarised thus: They were to be entitled to take steps for establishing their own organization during the currency of the notice which was putting an end to the functioning of their previous agencies: they were to be entitled to have their European assistants installed in the offices of their old agents in order that those assistants might familiarize themselves with business conditions in the areas in which they were going to work. Lastly, and this perhaps is even of greater importance than the other advantages, there was to be no competition at all as regards the Madras area for a period of five years and as regards the Ceylon area only to a very limited degree, that is to say, so far as they chose to give express permission to sell products similar to their products. It seems to me that these were highly valuable advantages which the assessees were obtaining for themselves by

means of the payments which were made and to be made, totalling altogether the two sums of Rs. 30,000 and Rs. 20,000.

Now, as I have pointed out, the Commissioner has thought fit to split up the total consideration money, if I may so describe it, into three parts, and he has made a tripartite division of his own accord, and he has so far as one can see, without any justification whatever decided that the actual sum of Rs. 10,000 with which we are immediately concerned ought to be taken to be referable to the three objects which he has set out at the beginning of the case he has stated. He has even gone beyond that in fact, because at the end of the case he has said: "I would allocate 60 per cent. of the payments to *ex gratia* rewards, 10 per cent. to restrain future competition, and 30 per cent. towards facilitating the transfer." It is not easy to say, or indeed to imagine, on what possible hypothesis or upon what basis the Commissioner of Income Tax has arrived at those percentages. Quite clearly on the evidence, that is to say, on the evidence furnished by the correspondence which the Commissioner himself had set out as annexures to the case, it is quite impossible to discover anything which would warrant the splitting up of this sum into difinite aliquot parts as the Commissioner had done, or even to warrant its being split up and designated as being referable to the three matters which the Commissioner described as payments as *ex gratia* rewards, for restraint of future competition and towards facilitating the transfer. In our opinion, there was absolutely no evidence at all upon which the Commissioner of Income Tax could have come to that conclusion. But what is far more important for the purpose of the determination of the case now before us, is that there was nothing in the pure facts of the case as set out by the Commissioner in the paragraph headed "Facts" which justified him in taking the view that any part whatever of the Rs. 10,000 was payment in the nature of an *ex gratia* gift made in recognition of past services. On the contrary, the assessees, or rather their predecessors say quite definitely and categorically in paragraph (6) of their letter of the 4th February, 1927, that the sum which they were willing to pay was as compensation to a certain extent for the loss of the agency, that is to say, they were prepared to pay the sum of Rs. 30,000 to make up to a certain degree the remuneration which Messrs. Parry & Co. would otherwise have earned as agents of Messrs. Brunner Mond & Co. But it is to be noted that they expressly said that that payment would only be made, provided there was an undertaking on the part of the ex-agents not to enter into competition with them for a period of five years.

It is true that when dealing with the Colombo Agency, Messrs. Brunner Mond & Co. did say in their letter of the 12th March, 1929, in effect, that the payment of Rs. 20,000 was as compensation for the loss of this agency, and as an indication of their appreciation. But there again the payment was to be made on the understanding that the ex-agents would not handle their (the company's) products without obtaining their previous permission.

So, I think, it can equally well be said in respect of the Colombo Agency that the payment which Messrs. Brunner Mond & Co., were prepared to make was for the direct purpose of securing certain definite advantages to themselves, and, if I may so put it, to smooth the way as regards their future business operations in the territories theretofore worked by Messrs. Parry & Co., of Madras and Messrs. Hayley and Kenny of Colombo respectively.

The learned Advocate-General has argued very forcibly that it is not competent for us to travel outside the very circumscribed position demarcated for us by the Commissioner of Income Tax by the form of the question of law which he has submitted to the Court. As I have already pointed out, the main and indeed the fundamental question upon which the opinion of the Court is sought, is contained in the question whether payments amounting to Rs. 10,000 are or are not expenditure liable in charge under Section 10 (2) (*ix*) of the Act. If the learned Commissioner had stated the question simply in that form, no objection could have been taken by the learned Advocate-General on behalf of the Income Tax authorities, to our answering it, even with a plain "yes" or "no." But the position is complicated by the fact that the Commissioner of Income Tax has purported to make certain findings of fact with regard to the character or, perhaps more accurately, the purpose of the payment which was made, in that he has divided it up in the way I have already described. The learned Advocate-General says that the Court must take the findings of fact as they are stated by the Commissioner, and either express an opinion upon those findings or say that it is impossible to express any opinion, because the findings of fact are not warranted by the evidence upon which they were based, and it is not competent to us to look at the real situation and to give a decision or judgment founded upon what appears to us to be the real position, having regard to all the circumstances and all the facts as revealed by the evidence which the Commissioner has put before us. I have already stated that in our opinion there was no justification for what the Commissioner says he has found as a fact, namely, the splitting up of the sum of Rs. 10,000 or the finding that it was made in part as an *ex gratia* gift in recognition of past services. The learned Advocate-General says that nevertheless we must answer such part of the question as we can upon those findings, and reject the rest, or else say that it is impossible to deal with this reference at all.

The learned Advocate-General has quoted a number of authorities. Notably the case of *The Tata Iron and Steel Company Limited* v. *The Chief Revenue Authority*, *Bombay*, where it was apparently decided that the decision of the Court given upon a reference under Section 51 of the Indian Income Tax Act (VII of 1918) which was the forerunner of the present Section 66 of the Act of 1922, is not a judgment within the meaning of Chapter 39 of the Letters Patent of the Bombay High Court, so as to give rise to a right to appeal. The Advocate-General argued that that decision which was one of the Judicial Committee of the Privy Council,

was passed upon the view that the Court, when dealing with references under the Income Tax Act, was only functioning in an advisory or consultative capacity, and that, therefore, the High Courts in India when dealing with references under the Indian Income Tax Act, have not the same powers with regard to an examination of the facts upon which the reference is founded as have the King's Bench Division of the High Court in England. It seems to me, however, that the decision in *The Tata Iron and Steel Company, Limited* v. *The Chief Revenue Authority, Bombay*, proceeded much more upon the footing of the passage in the judgment of LORD ATKINSON at page 223 of the report, where his Lordship says: "The decision of the High Court does not in any way enforce the discharge of that liability, that is, the amount of the tax-payers' liability. It would appear clear to their Lordships that the word 'judgment' is not here used in its strict legal and proper sense. It is not an executive document directing something to be done or not to be done, but is merely the expression of the opinions of the majority of the Judges who heard the case, together with a statement of the grounds upon which those opinions are based. It amounts only to a ruling that a certain deduction claimed by a taxpayer to be allowed from the sum for which he has been already assessed to income tax is not permissible." I cannot hold, therefore, that the case of *The Tata Iron and Steel Company, Limited* v. *The Chief Revenue Authority, Bombay*, is any real authority for saying that it is not open to this Court to examine for itself the whole of the case which is put before it by the Commissioner of Income Tax under Section 66 (1) of the Act. If that part of the case which contained a statement of what has been found as fact, merely contained conclusions on questions of pure facts, then and in that event no doubt it would not be open to this Court to go behind the statement of facts, if only for the reason that there would be no material upon which it was possible for it to do so. But in the present instance what the Commissioner of Income Tax says he has found as facts is actually a series of conclusions which are founded partly on pure facts and partly on inferences which he has drawn from those facts. The pure facts in the present instance are the matters set out in paragraphs 3 and 4 of the case and what he has stated in the opening paragraph as having been found as a fact specially as regards item (*a*), is really the inferences which the Commissioner has drawn from the bare facts which he has stated in paragraphs 3 and 4. In those circumstances, it seems to me that we ought to deal with this case upon the principles which are contained in a passage in the judgment of the Master of the Rolls in the case of *The Gramophone and Typewriter Ltd.* v. *Stanley*, where his Lordship said: "The question arises on a case stated by the Commissioners. It is undoubtedly true that, if the Commissioners find a fact, it is not open to this Court to question that finding unless there is no evidence to support it. If, however, the Commissioners state the evidence which was before them, and add that upon such evidence they hold that certain results follow I think

it is open, and was intended by the Commissioners that it should be open, to the Court to say whether the evidence justified what the Commissioners held. I am satisfied that the case stated by the Commissioners falls under the latter head. They have carefully stated the evidence but they have not, in my opinion, to use the word found in one of the authorities, "stated the appellants out of Court." There is also a passage in the judgment of the Master of the Rolls in the case of *The American Thread Company* v. *Joyce*, which is in these words: "In finding questions of pure fact, the tribunal is a tribunal without appeal. It is perfectly true that if it finds facts where there is no evidence, that becomes a matter of law, and we can set aside the finding." Reference may also be made to the case of *The Commissioners of Inland Revenue* v. *Frank Bernard Sanderson*, where it was held by the Court of Appeal that the evidence, before the Special Commissioners did not justify the conclusion of fact that an enforceable agreement for sale had existed between the parties prior to a written agreement (of 12th October, 1916). Lastly, we have very definite indication of the way the Court ought to act where it is not satisfied that the inference drawn by the Commissioner from the pure facts of the case is warranted by the evidence which he himself has set before the Court, in the judgment of ROWLATT, J., given by him when sitting at first instance in the case of *The Anglo-Prsian Oil Co., Ltd.* v. *Dale*, where he said: "There is no sort of question so far of any question of fact. I do not question what they say about the facts, or claim a jurisdiction to question that it was enduring benefit by getting rid of an onerous contract. All that I say is that does not go far enough. When I look at the facts, so far, all I see is one thing, that is getting rid of a payment which falls to be charged to the revenue account every year, namely, payment of commissions to people who run the business." In the previous paragraph he had said with reference to the judgment of the LORD CHANCELLOR in the case of *Atherton* v. *British Insulated and Helsby Cables, Ltd.*, "What LORD CAVE is quite clearly speaking of is a benefit which endures, in the way that fixed capital endures; not a benefit which endures in the sense that for a good number of years it relieves you of a revenue payment. It means a thing which endures in the way that fixed capital endures. It is not always an actual asset, but it endures, in the way that getting rid of a lease or getting rid of onerous capital assets or something of that sort as we have had in the cases, endures. I think that the Commissioners, with great respect, have been misled by the way in which they have taken 'enduring' to mean merely something that extends over a number of years. I do not quite understand how the view that they appear to have taken is consistent which the numerous cases." Then the learned Judge proceeded to deal with the case almost as if the whole matter was at large and he was in a position to form his own judgment upon the whole of the materials then before him.

All these cases to which I have just referred and certain other cases are collected and discussed in SUNDARAM's book on the Law of Income Tax at p. 1037 (*et seq.*).

In the light of all those authorities, I think what we ought to do in the present instance is to give a decision which will operate by way of guidance to the Commissioner of Income Tax upon the pure facts of the case as disclosed in the evidence which the Commissioner himself has put before us and upon which the matter really arises. Upon that view, the burden is cast upon us of deciding whether or not payments amounting to a sum of Rs. 10,000 made by the assessee in the year 1931-32 are properly deductible by them under the provisions of Section 10 (2) (*ix*). I have enumerated what appears to be the several advantages which were being derived by the assessees from the expenditure of the sum in question and the later instalments which in total would make up the two sums of Rs. 30,000 and Rs. 20,000. It can scarcely be disputed, I think, that whatever may be the way in which one regards the payment from the point of view of relief from income-tax, there is no doubt whatever that the purpose and the intent with which those payments were made was to facilitate and promote the business interests of the assessees in the two areas in Madras and Ceylon and, therefore, without any expansion or extravagance of language one can quite easily hold that it was an expenditure incurred solely for the purpose of earning profits or gains by the undertaking concerned and, indeed, the learned Advocate-General, who has argued this matter very fully and cogently on behalf of the income-tax authorities, has scarcely troubled himself to contest that aspect of the matter. On the contrary, he has conceded that what was being done, at any rate as regards the operations which the Commissioner of Income Tax has placed under (*b*) and (*c*) of paragraph was to nurture and protect what the learned Advocate General has described—though in my opinion, inaccurately described—as a new business. I do not think it can properly be said on any aspect of the matter that what Messrs. Brunner Mond and Company (India), Ltd., or the Imperial Chemical Industries (India), Ltd., were doing was to found a new business; what they were doing was to take into their own hands for the purpose of conducting by means of their own employees a business which therefore had been carried on through the instrumentality of the firms in Madras and Colombo. They were not nurturing or protecting a new business but they were making, in my judgment, an outlay of a certain sum of money in order to facilitate their own future operations. In those circumstances, it seems to me unarguable to suggest that the assessees were doing anything else than making payment for the purpose of acquiring for themselves an enduring benefit which would result in increased profits or gains.

The real question which has been canvassed before us in this case and the actual point upon which we have to express our

opinion is, whether or not the expenditure was of the kind which falls within the proviso contained in the words within the parenthesis in sub-section (ix). Those words are "not being in the nature of capital expenditure." Paraphrasing the whole of sub-Section (ix), a proposition can be formulated thus: It is permissible that an allowance shall be made for an expenditure which has been incurred solely for the purpose of earning profits or gains of any business, provided that such expenditure is not an expenditure in the nature of a capital expenditure. Stated in a different form, the problem which we have to solve is whether or not the payment of the sum of Rs. 10,000 was a payment which ought to be charged to capital account in the books of the assessees or could properly be chargeable to revenue account. The assessees themselves have contended, as the Commissioner has admitted in paragraph 5 (*b*) of the case, that the payment was a definite business one and the Commissioner has stated in the course of his narrative in paragraph 3 of the statement of the case that the assessees have distributed the charge in their revenue accounts, passing Rs. 4,500 through the books on 30th September, 1928, and Rs. 6,000 annually since then; so that Rs. 6,000 falls in the accounts for the year ending 30th September, 1930, that is, in respect of the payment made to the Madras Firm and presumably the position was the same as regards the payment to the Colombo Firm, because the Commissioner makes no material distinction though he puts the matter slightly differently by saying: "The assessee has passed Rs. 4,000 through his books annually on this account beginning with 30th September, 1930, under the present assessment." Presumably he is there referring to the revenue account. There is no doubt that the question whether any particular payment should properly be described as in the nature of capital expenditure or not is one of considerable difficulty and perplexity and even as recently as last year the present Master of the Rolls, in giving judgment in the analogous case of *Golden Horse Shoe (New), Ltd.* v. *Thurgood*, made the following observation: "After careful consideration of the present case in the course of which my mind has fluctuated on either side, I think it is to be decided upon its own facts—that none of the tests suggested afford a strict rule of guidance." We are disposed to take the same view and to say, after a very careful consideration of the whole of the authorities which have been put before us, that it is not possible to lay down any hard and fast rule or to enunciate a rigid and scientific principle which can be applied as a criterion when this particular point comes up for determination. The decided cases, however, do of course afford considerable assistance. In *Vallambrosa Rubber Co.* v. *Farmer*, LORD DUNEDIN suggested one test to be applied and that is whether or not the payment was of a kind which would be made "once and for all" by way of a lump sum. Obviously that is not a test which would afford any great assistance in the majority of the cases coming before the Court and in regard to that particular test, VISCOUNT CAVE, who was then LORD

CHANCELLOR, in the case of *British Insulated and Helsby Cables* v. *Atherton* made this comment: "In *Vallambrosa Rubber Co.* v. *Farmer* LORD DUNEDIN, as President of the Court of Session, expressed the opinion that 'in a rough way' it was not a bad criterion of what is capital expenditure—as against what is income expenditure—to say that capital expenditure is a thing that is not going to recur every year; and no doubt this is often a material consideration. But the criterion suggested is not, and was obviously not intended by LORD DUNEDIN to be, a decisive one in every case; for it is easy to imagine many cases in which a payment, though made 'once and for all' would be properly chargeable against the receipts for the year. Instances of such payments may be found in the gratuity of £1,500 paid to a reporter on his retirement, which was the subject of the decision in *Smith* v. *Incorporated Council of Law Reporting for England and Wales* and in the expenditure of £4,994 in the purchase of an annuity for the benefit of an actuary who had retired, which in *Hancock* v. *General Reversionary and Investment Co.* was allowed, and I think rightly allowed, to be deducted from profits." Then the LORD CHANCELLOR said: "When an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital." Then he says that there is considerable authority for that view and he cites various cases. He held that the case he was then dealing with, which was concerned with the establishment of a pension fund for the clerical and technical salaried staff of the Appellants, fell within the same principle, and, he came to the conclusion that such an expenditure was in the nature of capital expenditure and, accordingly, that the deduction of the amount from profits was rightly held by the Court of Appeal not to be admissible. The opinion of the LORD CHANCELLOR was shared by two other members of the House, LORD ATKINSON and LORD BUCKMASTER. But LORD CARSON and LORD BLANESBURGH gave dissentient judgments and some of the passages in LORD BLANESBURGH'S judgment are very material and useful for our present purpose. At p. 236 his Lordship said with reference to the matter then under discussion: "In no sense of the word 'capital,' circulating, working or fixed, did this expenditure involve any withdrawal. It was made out of gross receipts in a year in which, working capital and, a *fortiori*, fixed capital, remaining intact, a large surplus still emerged. Nor, in my judgment, did the expenditure in any relevant sense create a new asset of the company of the nature of a fixed capital asset or any other." And referring to what LORD JUSTICE SCRUTTON had said when the case was before the Court of Appeal, LORD BLANESBURGH made this comment: "The learned Lord Justice does not more closely describe this so-called asset nor, fixed though it was, did he attach to it a name by which it could be recognised.

He did not suggest that it resulted in an enhanced goodwill. He could not, in my judgment, have done so with reason, because it has never, I think, even been suggested that a contented personnel is an element in goodwill, whatever else it may be. In that state of things it has occured to me, my Lords, that the existence or non-existence of this so-called asset might fairly be submitted to the prosaic test of asking what in a liquidation would be forthcoming in respect of it when a liquidator essayed his statutory duty to realise the company's assets and divide the proceeds amongst his constituents. Certainly no part of the fund. That in its entirety is completely alienated. And I can myself think of nothing else. Moreover, my Lords, a reference to the authorities shows, it seems to me, clearly that it is by reference to no such shadowy conceptions that the words of the statute "employed as capital" have to be interpreted. Such things as a purchase of goodwill involving a capital expenditure might come within them: *Smith & Son* v. *Moore*, an excess profits duty case." Then he quotes various other instances.

Now, the passage which I have quoted from LORD BLANESBURGH's judgment suggests two further tests in addition to those indicated by LORD DUNEDIN and LORD CAVE. The first test is this : Did the expenditure involve any withdrawal of capital? It would seem that in the case with which we are concerned the payment of Rs. 10,000 involved no withdrawal of capital. Indeed, there is no evidence before us that it did anything of the kind. On the contrary, it was debited to the revenue account.

The other test suggested by LORD BLANESBURGH is the prosaic test: What would be forthcoming in a liquidation as a result of the expenditure which has been made? In the present instance, again, as my learned brother pointed out repeatedly in the course of the argument, if there were any question of selling or even valuing what the assessees had acquired as a result of the expenditure of Rs. 10,000, the answer would have to be "There was nothing they could sell and nothing that anyboby could accurately value." What may have been of considerable or even of immense value to them for the purpose of their business operations in Madras and Colombo, had no material or market value and there was nothing which would in any sense properly be described as an addition to the assets of the company. In applying these tests, some little difficulty is created by the latter part of the criterion suggested by LORD CAVE, because he seems to have been of the opinion that a payment ought to be regarded as capital expenditure, if it resulted in the acquisition of any enduring benefit or advantage to the business of the persons or firm making the payment. The difficulty to a large extent, if not wholly, disappears, however, upon a perusal of the judgment of LORD JUSTICE ROMER in the case of *Anglo Persian Oil Co.* v. *Dale*. The observations of the learned Lord Justice are so important for our present purposes that I take leave to quote at length several passages from his very illuminating

judgment. Referring to the English Income Tax Act, his Lordship said: "So far as the Act itself is concerned one is therefore left without guidance as to the deductions that are permissible, but with the mind somewhat unsettled by reason of the list of prohibited deductions as to what, in the view of the legislature, is to be considered for the purposes of income-tax the balance of the profits or gains. In these circumstances, it is not surprising that the cases in which the Court has been called upon to say whether some particular deduction is or is not permissible should have been numerous and not always easy to reconcile with others in which the facts were not dissimilar. Nor is it surprising that learned Judges should have applied tests which, however satisfactory for the purpose of solving the particular problem before them, should turn out to be inconclusive or insufficient when applied to the facts of another case. The law applicable to such cases as the present was, it seems to me, placed beyond the realms of controversy. The boundary line between deductions that were permissible and those that were not, had previously been uncertain and difficult to follow. As regards the large majority of deductions, there was, and could be, no conceivable doubt. They were clearly on one side of the line or the other. But as regards a comparatively small number, it was difficult to say on which side of the line they fell. This was particularly the case where, as in the present one, an expenditure, is not a recurring one, but is made once and for all. It was pointed out by LORD CAVE in *Atherton's Case*, that an expenditure, though made once and for all, may nevertheless be treated as a revenue expenditure. And he then added this: "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of a special circumstance leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital." Then, LORD JUSTICE ROMER states his explanation of LORD CAVE's observations in these words: "It should be remembered that the expenditure is to be attributed to capital if it be made with a view to bringing an asset or advantage into existence. It is not necessary that it should have that result. It is also to be observed that the asset or advantage is to be for the 'enduring' benefit of the trade. I agree with ROWLATT, J., that by 'enduring' is meant 'enduring in the way that fixed capital endures." An expenditure on acquiring floating capital is not made with a view to acquiring an enduring asset. It is made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date." Then he continued: "Nor, of course, need the advantage be of a positive character. The advantage may consist in the getting rid of an item of fixed capital that is of an onerous character, as was pointed out by this Court in *Mallet* v. *Stavely Coal and Iron Co.* Then comes a very important passage: "This being the test to be applied in such cases as the present, it is obvious that the question

whether an expenditure made once and for all is or is not to be treated as chargeable to capital and not revenue, is one of fact only. Being a question that the Commissioners are eminently qualified to answer, it is to be hoped that in future they will answer it by reference to the language of the test laid down by LORD CAVE, and not as though they are deciding a question of law. Too often in the past, the Commissioners have found that a particular sum is or is not a permissible deduction. That is a question of law or, at any rate, mixed law and fact. If they will find that the expenditure in question was or was not made, as the case may be, with a view to bringing into existence some asset or advantage for the enduring benefit of the trade, their finding will be one of fact, and if there be some evidence upon which the finding can reasonably be made, it will not be subject to review in the Courts." That passage might very well be taken to heart, if I may say so with respect, by the Commissioners of Income Tax in this country. If the Commissioner in the present case had contended himself merely with a finding of fact on the lines suggested by LORD JUSTICE ROMER, what he has decided could not have been open to questions by this or any other Court. I have already expressed my opinion that in the present case there was no evidence on which the learned Commissioner of Income Tax could have come to the conclusion he did on matters which were really questions of mixed law and fact.

In our judgment the principles laid down in the case of *The Anglo-Persian Oil Co.* v. *Dale*, (the applicability of which to the present case the Commissioner of Income Tax disputes) are quite wide enough to provide the answer to the real and paramount question which is before us. In that case the facts were that in 1914 the Anglo-Persian Oil Co. entered into an agreement with a firm called Strick, Scott and Co., Ltd., under which the latter were appointed agents of the company to manage its business in Persia and the East for a term of ten years. It appears that the remuneration paid to these agents proved larger and more onerous than had been anticipated by the company; accordingly in the year 1922 the company entered into an agreement with Strick, Scott and Co., Ltd., whereby it was agreed that the agency should be terminated, that Strick, Scott and Co. should go into liquidation and wind up their business and that they would not start or act in or about any business connected with petroleum in a certain area in Persia, while in return the company should pay Strick, Scott and Co. a sum of £3,00,000. That sum was paid and the agency was terminated. The money was treated in the company's accounts as a revenue payment and was charged to revenue in instalments of £60,000 for five years. The company claimed that this course was correct and justified the deduction from its annual expenses as being one incurred for seeking the profits and gains. The Inspector of Taxes disputed this course and he claimed that the £3,00,000 ought to be treated as an expenditure on capital account as being an expenditure which brought to an end an onerous contract and secured to the company

a freedom from charges which would otherwise have continued for some years. The Commissioners of Income Tax accepted the latter argument and held that the sum of £3,00,000 was not an admissible deduction in computing the profits and gains of the company for the year ending 31st March, 1923, and adjusted the figures of the assessment for the years ending 5th April, 1923, 1924, 1925 and 1926 accordingly. MR. JUSTICE ROWLATT, when the matter came before him, held that the sum was an admissible deduction. His judgment from which I have already quoted in another connection and which is reported in *Anglo-Persian Oil Co.* v. *Dale* is very germane to our present problem. At the bottom of page 262, the learned Judge said: "What he, the Attorney-General, says is that this is not merely a question of getting rid of an annual expense in the form of commission, and he says also, as I understand him to paraphrase his words: "This is clearing the ground of the agency and embarking upon a new organization, in this district, of the business, by having your own organization and your own servants.' Now, in what way would that operate? It might mean that you simply start with your own servants without any expenditure at all, or might mean that you buy the good-will of somebody who has got a right to stay there and with whom you could not compete without paying them out—I understand it was suggested that there was something of that sort in this case, perhaps—or you might, as I say, expend money in the way of capital to get your service on its feet. What I feel here is that there is not a trace of any such thing. There is no evidence of it—none. There is not any evidence, and it was not suggested before the Commissioners as I understand it, that any part of this sum was paid for the purpose of acquiring anything analogous to goodwill on the part of these people. Of course they had to be paid for the value of their rights for ten years to receive this money."

Now the Advocate-General has argued before us that that passage of MR. JUSTICE ROWLATT, so far from being of assistance to the assessees, really tells in favour of the income tax authorities, because, said the Advocate-General, what Messrs. Brunner Mond and Co., or Imperial Chemical Industries (India), Limited, were doing was to acquire a new business or, at any rate, to acquire the goodwill of somebody else's business, I have already expressed the opinion that upon the facts—just as MR. JUSTICE ROWLATT felt in the case of *Anglo-Persian Oil Co., Ltd.* v. *Dale*, what I feel here is that there is no trace of anything of the kind. There is no evidence at all that the assessees were acquiring a new business or taking over any business other than their own business. They were merely taking over their own business, and they were not acquiring any goodwill belonging to anybody else's concern.

As I have already stated, MR. JUSTICE ROWLATT was of opinion that the payment of £3,00,000 in the Anglo-Persian Oil Co., Ltd., was an admissible deduction. On appeal the Court of Appeal held, even after applying the test laid down by LORD CHANCELLOR CAVE

in the case of *Atherton* v. *British Insulated & Helsby Cables, Ltd.*, that the payment in question did not bring any asset into existence, nor could it properly be said that it brought into existence an advantage for the enduring benefit of Company's trade within the meaning of the expression used by LORD CAVE. Accordingly, the Court of appeal held that the payment was a revenue payment, and so deductible by that company when ascertaining its net profits for the purpose of paying tax.

It seems to me that that decision of the Court of Appeal in a case where a company had bought out its agents—with a view to running their own business by their own staff—by means of the payment of the enormous sum of £3,00,000 must be taken by us as being ample authority for holding that the payment of a comparatively small sum of Rs. 10,000, the subject-matter of the present proceedings was a revenue payment and so was properly deductible by the Imperial Chemical Industries (India), Ltd., when arriving at their profit for the purpose of income tax.

I think also that the whole matter is put beyond all question by the decision in the recent case which I have already mentioned, *viz. Golden Horse Shoe (New), Ltd.* v. *Thurgood*, because in that case what was acquired was something tangible which as a matter of first impression might easily be considered to be in the nature of assets which ought to be properly comprised within the denomination of fixed capital. The Golden Horse Shoe (New), Ltd. had been formed for the purpose of acquiring the right to take away and re-treat very large dumps of residual deposits resulting from the working of a gold mine. These residual deposits were called "tailings." These tailings were known to contain a certain amount of gold, and by some new process of treatment some of this gold was recoverd and sold by the company. It was held by the Court of Appeal, reversing the decision of MR. JUSTICE FINLAY, that as the tailings were raw material already won and gotten, the amount expended in acquiring them was in the nature of an expenditure on the raw material of the company's trade, and therefore that for the purpose of assessing the company's profits or gains, the cost of the tailings treated during the period of assessment was a proper deduction from the proceeds realized by the sale of the gold extracted.

LORD JUSTICE ROMER said:—"The question to be decided in this case is whether the dumps are to be regarded as fixed capital or as circulating capital. If they are the former, it is conceded by the appellants that the assessment made on them is correct. If on the other hand, they are floating or circulating capital, it is conceded that the cost of them to the appellants must be debited in the profit and loss account, the account being credited with the cost price of what was left of the dumps at the end of the year of assessment. The dumps, in other words, must be dealt with in the profit and loss account as stock in hand has to be dealt with in the profit and loss account of any other trader." Then the learned

Lord Justice said: "The reason for this distinction being drawn between fixed and floating or circulating capital is not far to seek."

In the present instance, in my opinion, it cannot be said that the payment which was made was one other than one in the nature of a payment out of circulating capital; and it is obvious that the expenditure did not result in the acquisition of anything of a kind which could rightly be described as a new asset or as an addition to the fixed capital of the company. The acquisitions derived from the payment were metaphysical rather than physical.

We come back to the point of view described by LORD HANWORTH, the present Master of the Rolls in *Golden Horse Shoe (New), Ltd.*, when he said at page 560 of the report: "The test of circulating as contrasted with fixed capital is as good a test in most cases to my mind as can be found; but that involves the question of fact: Was the outlay in the particular case from fixed or circulating capital?" That is only to say once more that the matter really resolves itself in the last resort into a question of fact in each particular case, and there is no sure touchstone which can be applied universally to solve a problem of the kind involved in the general proceedings.

We accordingly hold that in this case the payment of Rs. 10,000 made by Imperial Chemical Industries (India), Limited, and debited to their revenue account for the year ending 30th September, 1930, and coming for assessment into the tax year 1931-32, was an allowance they were entitled to make under the provisions of Section 10 (*2*) (*ix*) of the Income Tax Act of 1922, or to use the precise language of the question submitted to us, the payment amounting to Rs. 10,000 described by the assessee as compensation to ex-agents was expenditure allowable in charge under Section 10 (*2*) (*ix*) of the Act.

The assessees will have the costs of this reference.

LORT-WILLIAMS, J.—I agree.

Reference answered accordingly.

[IN THE PATNA HIGH COURT.]

COMMISSIONER OF INCOME TAX, BIHAR & ORISSA

v.

MAHARANI LAKSHMIBATI SAHEBA OF DARBHANGA.

Courtney-Terrel, C. J., and Agarwala, J.

October 11, 1934.

HINDU UNDIVIDED FAMILY—SUMS RECEIVED BY WIDOW OF DECEASED BROTHER OF HOLDER OF IMPARTIBLE ESTATE—EXEMPTION—"SUMS RECEIVED AS MEMBER OF HINDU UNDIVIDED

FAMILY," MEANING OF—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 14 (1).

The assessee was a widow of the brother of the holder of an impartible estate. On her husband's death, she and a co-widow claimed the estate alleging that their husband had been separate from his brother. Ultimately the widows withdrew their claim on condition (i) that each of them received for life as maintenance properties yielding Rs. 70,000 per annum, (ii) that on the death of either of them the survivor was paid for the remainder of her life an additional sum of Rs. 13,000 per annum. Two such payments received by the assessee during the year of account were assessed to income tax. It was contended before the High Court that these sums were received by the assessee as member of an undivided Hindu family and were therefore exempt from tax under Section 14 (1) of the Income Tax Act : Held :—*that the object of Section 14 (1) was only to exempt sums received by a member of an undivided family who has a vested right in the income or property of the family, in other words, sums which belong to the assessee even before they are received by him. Section 14 (1) relieves the assessee from showing that the sum in respect of which he claims exemption has already been taxed in the hands of the family, but it does not relieve him from the necessity of proving that the sum received was part of the income or property in which he had a vested right as a member of a Hindu undivided family, and, as the assessee had not during the assessment or on appeal raised the issues necessary for the determination of the questions which arise under Section 14 (1), the claim for exemption could not be allowed.*

Case stated by the Commissioner of Income Tax, Bihar & Orissa, under Section 66 (2) of the Indian Income Tax Act (XI of 1922): Miscellaneous Judicial Case No. 108 of 1933.

STATEMENT OF CASE.

"Under Section 66 (2) of the Indian Income Tax Act, (XI of 1922, hereinafter referred to as "the Act") and at the instance of Maharani Lakshmibati Saheba of Darbhanga (hereinafter referred to as "the assessee") I have the honour to submit for the decision of the Hon'ble Judges of the Patna High Court the question of law referred to in paragraph 4 below, arising out of the assessment of the assessee for the financial year ended 31st March, 1932.

FACTS.—Maharaja Lakshmeswar Singh of Darbhanga, when he died, left two widows, *viz.*, the assessee, Maharani Lakshmibati Saheba, and Maharani Lakshmeswari Saheba. Maharajadhiraja Rameshwar Singh succeeded to the Darbhanga Raj on the death of Maharaja Lakshmeswar, but his widows brought a suit against him for recovery of the entire Raj. The suit was ultimately compromised. A copy of the petition of compromise on which the Civil Court

decree was based is enclosed herewith, marked as Annexure A. The terms of the compromise were:—

(*i*) that each of the Maharanis was to have settled on her for the term of her natural life, zamindari properties yielding a net income of Rs. 70,000 free of all payments of revenue, cess and other public demands, which were to be discharged by the defendant Maharaja Rameshwar Singh;

(*ii*) that the plaintiff Maharanis would not have the power to alienate any part of the property so settled on them;

(*iii*) that on the death of either of them, the properties settled on her should revert to the defendant, but that the surviving widow, during the remainder of her natural life would be entitled to receive from the defendant and his successors the sum of Rs. 13,000 per annum in addition to the income of the properties settled on her.

3. In accordance with the terms of this settlement, the petitioner received in 1337 Fasli which is the previous year of the assessment under consideration, *viz.* for the financialyear 1931-32 ended 31st March, 1932, a sum of Rs. 26,000 from the Maharajadhiraja of Darbhanga on account of annuities for the years 1336 and 1337 Fasli, due to her after the death of the Maharani Lakshmeswari. The Income Tax Officer included this sum in her total income for the year 1337 Fasli as part of her assessable income and levied an assessment accordingly under Section 23 (3) of the Act. A copy of his assessment order is annexed hereto marked as Exhibit B. Against this assessment, the assessee appealed to the Assistant Commissioner, who confirmed the Income Tax Officer's assessment as per his order, dated April 23, 1932, a copy of which is annexed hereto, marked as Exhibit C.

4. Not satisfied with the above appellate order, the assessee has formulated the following question of law for reference to the High Court under Section 66 (2) of the Act:

"Whether the said sum of Rs. 26,000 is income liable to taxation."

Accordingly I submit the question for decision of the High Court and give below my opinion on the same.

5. OPINION OF THE COMMISSIONER.—Exemption from taxation of the above-mentioned sum was claimed on two alternative grounds. It was argued that these annuities represented the capital value of the zamindari settled with Maharani Lakshmeswari, which by right of survivorship should have descended to the assessee, but which the latter gave up to the Maharajadhiraja and accepted in lieu therefor a smaller sum to be realised in annual instalments spread over a number of years. It was contended that these sums represented merely the value of the assessee's right to succeed to Maharani Lakshmeswari's estate which right, it was suggested, was sold to the Maharajadhiraja in lieu of recurring

payments for Rs. 13,000 per annum for life; and that merely because the price was to be realised in several annual instalments, it could not be treated as income. But there is nothing in the terms of the compromise to support this argument. Maharani Lakshmeswari had no estate to leave to the assessee as he had only a life-interest in the zamindari, which she got under the compromise decree and her right thereon ceased on her death. The assessee did not get her annuity as heir of Maharani Lakshmeswari but by the express terms of the compromise which gave her zamindari property yielding a net income of Rs. 70,000 on certain conditions and in addition an annual cash payment of Rs. 13,000 in the event of a certain contingency. Merely because that contingency happened to be the death of a certain person, it does not follow that the assessee got the cash payment as part of the estate of the deceased as her heir or successor. In the compromise deed there is no mention of any one succeeding to the estate of either of the two widows after her death. In fact it says nothing as to who is to succeed to the property which the deceased Maharani might leave. It is merely an agreement between the Maharajadhiraja and the assessee as to what she will accept as her maintenance allowance and in lieu of prosecuting the suit. There is therefore no substance in the argument that the assessee sold her right in the zamindari given for life to Rani Lakshmeswari to the Maharajadhiraja and accepted its price in instalments spread over several years as that zamindari was not for the assessee to sell. It was also argued before me that the zamindari income of Rs. 70,000 and the subsequent annuity of Rs. 13,000 should be regarded as the price of the assessee's right to the Raj and as such should be regarded as capital receipts. This argument also is not correct. Mere assertion of a right does not create it or establish it. In the compromise the Maharanis unequivocally admitted the right of Maharaja Rameswar Singh to succeed to the Raj. These widows would in any case have been entitled to maintenance allowances and the compromise merely stipulated what should be the amount of their allowance and incidentally extinguished the suit. The income from the zamindari portion of the allowance is not taxable being agricultural income but the cash payment is taxable: (*vide Vellanki Lakshmi Narasimha Rao* v. *Commissioner of Income Tax, Madras*, III I.T.C. 428).

6. The alternative argument put forward on behalf of the assessee is that this annuity may be taken to be a sort of thicca rent received by the assessee from the Maharaja of Darbhanga for the zamindari of Maharani Lakshmeswari which the assessee got but which, instead of managing herself, she gave to the Maharaja to manage in lieu of the annual payment. I have already pointed out that Maharani Lakshmeswari had no zamindari to leave to any heir, as her right to the zamindari ceased on her death. It is a purely cash payment and has no connection with the zamindari right.

7. I submit that the question may therefore be answered in the affirmative and a copy of the decision of the Hon'ble Court may kindly be certified to me for further action as required by Section 66 (5) of the Act."

Manohar Lal, for the Commissioner of Income Tax.

K. P. Jayaswal, *Murari Prasad* and *K. P. Upadhya*, for the assessee.

JUDGMENT.

AGARWALA, J.—The assessee has been assessed to income-tax on a sum of Rs. 26,000 which she claims is not subject to tax. The question referred for our decision is whether this sum is taxable. The only ground for exemption argued before us is that it is a sum to which Section 14 (1) applies. That sub-section runs as follows:

"14. (*i*) The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family."

The section premises; (*i*) a Hindu undivided family; (*ii*) that the person claiming exemption is a member of the family, and (*iii*) that the sum referred to is received as a member of the family.

The assessee is a widow of the brother of the late holder of the Darbhanga Raj which is an impartible estate. On the death of her husband she and a co-widow claimed the estate alleging that their husband had been separate from his brother. Ultimately the widows withdrew their claim on certain terms, two only of which are material at present. It was agreed (*a*) that each of the widows should receive for life, as maintenance, properties yielding Rs. 70,000 net per annum, and (*b*) that on the death of either of them the survivor should be entitled to receive for the remainder of her life an additional sum of Rs. 13,000 per annum. The sum assessed represents two such payments, which were in fact received in the year for which the assessment has been made. In the course of the assessment, and in the appeal from the order of assessment, the assessee claimed exemption either on the ground (*a*) that the annual payment should be regarded as part of the consideration paid to her as the price of immovable properties and therefore as capital and not income, or (*b*) as agricultural income. Both these contentions were rightly negatived and have not been pressed before us. In view of these contentions however, the tribunals of fact were not called upon to investigate the question whether the assessee is a member of a Hindu undivided family, or indeed, whether the late Maharajadhiraj and the assessee's husband were joint or separate. It is urged however, that the two widows having abandoned the claim that their husband had been separate from his brother, it must be held as a matter of law that they were joint. The admission made by the widows however, is not binding on the Crown which was not a party to the suit in which the admission was made. It is next contended that the

presumption of law being in favour of jointness the onus lies on the Income Tax Department to rebut that presumption. Conceding that this is so, the question still remains whether the sum in question was received by the assessee "as member of an undivided family." It is contended that when a member of a Hindu undivided family receives a grant by way of maintenance from the head of the family it is necessarily received "as a member of the family." I am unable to accept this contention. It is only in the case of a Hindu undivided family that the statute provides that a sum received as a member is exempt from the tax and it seems to me that the reason for this special consideration is obvious. In the case of an undivided Hindu family all the members have an interest in the joint income of the family and are entitled as of right to enjoy it. The fact that by reason of well recognised disqualifications such as certain diseases or sex, certain members are unable to claim the rights of fully participating coparceners does not affect their inherent right to be maintained out of the joint income. It is well established however, that when there is no joint property and no joint income there is no right to be maintained except in certain cases.

"Where there may be no property but what has been self-acquired the only persons whose maintenance out of such property is imperative are aged parents, wife and minor children ". (Mitakshara, cited in Mayne on Hindu Law and Usage, para. 451).

In the case of a wife and minor children therefore, the legal obligation of a Hindu to maintain them is the same as the obligation of a non-Hindu. He is bound to maintain them out of his own property and income. In the case of other dependants, there is no legal obligation to maintain them at all in the case of a non-Hindu or a separate Hindu but in the case of an undivided Hindu family a member is entitled to be maintained to the extent of his or her interest in the joint income, a widow not being entitled to maintenance in excess of what her deceased husband could have claimed. When a maintenance allowance is received by a member of an undivided Hindu family out of the joint income of the family the recipient receives only what is, his, or her, own. The sum received by the recipient is taxable in the hands of the family. If it has not in fact been taxed in the hands of the family it would be taxable in the hands of the recipient but for the exemption provided for in Section 14 (1). That sub-section exempts it from taxation whether it has in fact been assessed in the hands of the family or not. It appears to me that the object of Section 14 (1) is to assure this exemption and no more. The remainder of Section 14 lends support to this view. Sub-section (2) exempts from assessment sums received by an assessee (*a*) by way of dividend as a shareholder in a company or (*b*) out of the profits of a firm of which he is a partner. It will be observed therefore that what the second sub-section exempts are sums which belonged to the assessee even before they actually reached him. Reading Section 14 as a whole

I am able to see no reason why the first sub-section should be held to apply to a sum in which the assessee has no interest until it is actually received, which is so in the case of a person who receives maintenence allowance out of income in which he has no vested right. The difference between the exemptions granted by sub-sections (1) and (2) respectively, of Section 14, is that under sub-section (1) the assessee is exempt even though the sum has not in fact been taxed at source, but under sub-section (2) the assessee is entitled to exemption only in respect of sums taxed at source. The first sub-section merely relieves the assessee from showing that the sum in respect of which he claims exemption has already been taxed in the hands of the family. It does not relieve him from the necessity of showing that the sum received is a part of income, or property in which he had vested right as a member of a Hindu undivided family. In the present instance the assessee did not during the assessment by the Income Tax Officer or in her appeal from that assessment raise the issues necessary for the determination of the questions of fact which arise under Section 14 (1). For this reason, the question now raised does not arise out of the appellate order. An impartible estate may or may not be self-acquired property. Even assuming that the assessee is a member of an undivided family, the estate is impartible and the facts necessary for the determination of the question referred are not before us, because the assessee did not raise the proper issues before the tribunals of fact. I would therefore answer the question referred to us in the affirmative. The Commissioner of Income Tax is entitled to the costs of the reference. Hearing fee five gold mohurs.

COURTNEY-TERRELL, C. J.—I agree.

Reference answered accordingly.

[IN THE HIGH COURT OF MADRAS.]

N. A. S. V. VENKATACHALAM CHETTIAR

v.

COMMISSIONER OF INCOME TAX, MADRAS.

Beasley, C. J., Ramesam and King, JJ.

December 4, 1934.

REFERENCE—COMMISSIONER'S ORDER IN REVISION—ORDER NOT PREJUDICIAL TO ASSESSEE—NO REFERENCE LIES—APPLICATION FOR REFUND—DISMISSAL—APPLICATION FOR MANDAMUS UNDER SPECIFIC RELIEF ACT—WHETHER MAINTAINABLE—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 33, 48 (2), 50-A (1), 66 (2) AND (3)—SPECIFIC RELIEF ACT (I of 1877), SECTION 45.

The petitioner applied under Section 48 (2) of the Income Tax Act for refund of tax which had been levied from his father. This application was rejected by the Income Tax Officer on the ground that he was not the assessee on whom the assessment was made. The petitioner applied to the Commissioner under Section 33 of the Act for rescission of the order of the Income Tax Officer and for refund,

This application was also rejected. The petitioner thereupon moved the Commissioner to make a reference to the High Court and, on the rejection of this application, he applied to the High Court under Section 66 (3) of the Income Tax Act and Section 45 of the Specific Relief Act, for an order directing the Commissioner to make a reference: Held,—(i) *that as the order made by the Commissioner on revision under Section 33 was not one enhancing an assessment or an order prejudicial to the petitioner within the meaning of Section 66 (2), no reference could be made to the High Court and the High Court had therefore no power to require the Commissioner to state the case under Section 66 (3)*; (ii) *the remedy under Section 45, Specific Relief Act, was also not open to the petitioner because there was another remedy, namely, by way of appeal to the Assistant Commissioner under Section 50-A(1) of the Income Tax Act.*

Petition to the High Court under Section 66 (3) of the Indian Income Tax Act (XI of 1922) and Section 45 of the Specific Relief Act requesting the High Court to direct the Commissioner to state a case to the High Court: [O. P. No. 128 of 1934].

The petitioner's father Sevugan Chettiar, was a partner in N. A. S. U. Firm, Toungoo, Burma. The said firm was, for the year of assessment 1930-31 registered under Section 2(14) of the Income Tax Act and assessed as such. The said Sevugan Chettiar died on June 28, 1931, and the petitioner succeeded to the said business and was being assessed as such. He applied on January 18, 1922, to the Income Tax Officer, Karaikudi, for refund under Section 48 (2) read with Section 26 of the Income Tax Act in respect of the assessment as referred to above. The Income Tax Officer by his order dated September 21, 1933, held that the petitioner "was not the assessee on whom the assessment was made" and therefore he was not entitled to claim refund under Section 48 (2). The petitioner thereafter applied under Section 33 to the Commissioner of Income Tax, for rescission of the order of the Income Tax Officer and for refund of the amount due. The Commissioner of Income Tax held that the petitioner was not entitled to the refund in respect of the assessment of 1930-31. The petitioner thereupon moved the Commissioner under Section 66 (2) of the Income Tax Act, as amended by Act XVIII of 1933, for drawing up a statement of the case and referring it to the High Court for the decision of the question of the legality of the refusal to order the refund prayed for. The Commissioner declined to make a reference on the ground that his order under Section 33 was not one enhancing an assessment or otherwise prejudicial to the petitioner and the petition was therefore incompetent.

The Commissioner's order ran as follows:

"The petitioner has no right of application under Section 66 (2) since no order under Section 31 or 32 has been passed in the matter, and the Commissioner's order under Section 33, which merely declined to interfere with the Income Tax Officer's decision was not one "enhancing an assessment or otherwise

prejudicial to him." The application is therefore rejected as incompetent. Petitioner may withdraw it within the time specified in the second proviso to Section 66 (2), and if he does so the fee paid will be refunded."

The petitioner thereupon applied to the High Court under Section 66 (3) of the Indian Income Tax Act and Section 45 of the Specific Relief Act for an order requiring the Commissioner to state the case to the High Court.

R. Kesava Aiyangar, for the petitioner.

M. Patanjali Sastri, for the Commissioner.

JUDGMENT

BEASLEY, C. J. :—This is a petition under Section 66 (3) of the Indian Income Tax Act as amended. The petitioner applied to the Income Tax Officer for a refund of income tax under Section 48 of the Act. This application was refused. The petitioner then got the Commissioner of Income Tax to take the matter up in review under Section 33 and in review the Commissioner refused to interfere with the order of refusal of the Income Tax Officer. It is common ground that the order made by the Commissioner was one under Section 33. The petitioner then required the Commissioner of Income Tax to refer the matter which he suggested was a question of law to the High Court under Section 66 (2) of the Income Tax Act. The Commissioner took the view that that application to him under Section 66 (2) was incompetent because his order under Section 33 was not one enhancing the assessment or otherwise prejudicial to the applicant (the assessee). Section 66 (2) which contains an amendment affecting this question, reads as follows :—

"Within sixty days of the date on which he is served with notice of an order under Section 31 or Section 32 or of an order under Section 33 enhancing an assessment or otherwise prejudicial to him...........the assessee in respect of whom the order of decision passed may by application...require the Commissioner to refer to the High Court any question of law arising out of such order..."

The view taken by the Commissioner is that his order is not one which comes within the words "otherwise prejudicial to him" (the assessee). With that view we entirely agree. What Section 33 clearly contemplates is an order by the Commissioner which alters the position of an assessee or an applicant to that person's prejudice. In this particular case, his position had been prejudiced already by the refusal of the Income Tax Officer to grant him the refund which he required. The Commissioner's order did no more than leave him in that position and, it is quite clear to us, was not an order which was prejudicial to the petitioner in the sense intended, namely, that his position at that time, that is, the date of the Commissioner's order, was altered by that order to one of prejudice to him. That being so, he could not apply under Section 66 (2) to the Income Tax Commissioner, no order to his prejudice having

been passed. He, however, alternatively now seeks that the matter may be dealt with under Section 45 of the Specific Relief Act. This remedy is clearly not open to him because a remedy is provided by Section 50-A (1) of the Amended Act. That provides that "any person objecting to a refusal of an Income Tax Officer to allow a claim to a refund under Section 48 or 48-A or 49 or to the amount of the refund made in any such case, may appeal to the Assistant Commissioner.' That provision was in force at the time when the order of the Income Tax Officer in this case refusing a refund was made and that was the assessee's remedy and having that remedy open to him he did not avail himself of it. Section 45 of the Specific Relief Act cannot, therefore, be invoked to the relief of the petitioner here.

For these reasons, the petition must be dismissed with costs Rs. 150 to the Commissioner of Income Tax.

RAMESAM, J.—I agree.
KING J.—I agree.

Application dismissed.

[IN THE MADRAS HIGH COURT.]

MOTHAY GANGARAJU

v.

COMMISSIONER OF INCOME TAX, MADRAS.

Beasley, C. J., Ramesam, J., and King, J.

December 4, 1934.

BUSINESS—PROFIT FROM ISOLATED TRANSACTION OF SPECULATION NOT CONNECTED WITH ASSESSEE'S BUSINESS—EXEMPTION FROM TAX—CASUAL AND NON-RECURRING RECEIPT—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 4 (3) (*vii.*)

The assessee who was a landowner and a money-lender and had an interest in certain cotton mills purchased in a Court auction the right, title and interest of a person (who was not one of his debtors) in certain legacies, for Rs. 39,800. There was a protracted litigation over the legacies and he ultimately recovered in the year of account Rs. 1,97,025. The assessee had spent Rs. 46,626 as costs and purchase money and the income tax authorities levied tax on the balance of Rs. 1,50,399 on the ground that this was income from an adventure in the nature of a trade. Held, *that the transaction was not an adventure or concern in the nature of a trade as it had no connection whatever with the money-lending trade or other business activities of the assessee. It was an isolated transaction, though probably entered into by way of speculation, and the income was not, therefore, assessable to income tax.*

RUTLEDGE *v.* COMMISSIONERS OF INLAND REVENUE [14 Tax Cas. 490] *distinguished.*

Case stated by the Commissioner of Income Tax Madras, under Section 66 (3) of the Indian Income Tax Act [O. P. No. 159 of 1932.]

STATEMENT OF CASE.

"In accordance with the High Court's order...I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under Section 66 (3) of the Income Tax Act (XI of 1922).

FACTS.

2. The petitioner is a money-lender and financier carrying on an extensive business at Ellore within the jurisdiction of the Income Tax Officer, Ellore Circle. In determining his total income for the assessment of the year 1930-31 (accounting year, official year 1929-30) the Income Tax Officer included a sum of Rs. 1,50,399 under the head 'business' being the profits which the petitioner derived from realising a decree debt. This reference relates to the assessment of the said sum.

3. The facts relating to this sum are as under:—On the 22nd March, 1926, the petitioner bought in Court-auction for a sum of Rs. 39,800 the right, title and interest of Parthasarathi Appa Rao in certain legacies left by one Venkayamma, the mother of the minor proprietor of the Medur Estate. There had been protracted litigation regarding the right of Venkayamma to the income of the Medur Estate and regarding the validity of the legacies left by her. On the date on which the petitioner purchased Parthasarathy Appa Rao's interest in these legacies the position was that the Privy Council had decided in favour of Venkayamma's right and the High Court at Madras had in pursuance of the decision of the Privy Council passed a preliminary decree declaring that Venkayamma had power to dispose of the income of the Medur Estate and that the legatees under her will were entitled to payment of the legacies and directing the Sub-Junge, Bezwada, to take accounts and pass the final decree. Parthasarathi Appa Rao was the assignee of four of the legatees and as such was entitled to two pecuniary legacies of Rs. 80,000 and Rs. 40,000 respectively with interest at 6 per cent. per annum from 9th March, 1900 and to the entire residue of the assets left by Venkayamma after the distribution of the various other legacies mentioned by her in her will. The Sub-Judge, Bezwada, passed the final decree on 25th June 1929 and the amount due to the petitioner as the purchaser of Parthasarathi Appa Rah's interest in respect of the two pecuniary legacies was determined to be Rs. 3,32,499. The amount of Rs. 39,800 paid by the petitioner for purchasing Appa Rao's interest in respect of the legacies had been debited to a separate folio styled "Bezwada Sub-Court O. S. No. 30 of 1926" in the petitioner's ledger account which related to both non-business and business transactions. As the purchaser of Appa Rao's interest in the legacies, the petitioner was the second plaintiff in the suit O.S. 30 of 1926 of the Bezwana Sub-Court and

he had to incur expenses to conduct that suit. The amount so spent was also debited to the account mentioned above. Including such expenditure the balance at the end of the year of account was Rs. 46,626 which included the original payment of Rs. 39,800. In pursuance of the Subordinate Judge's final decree dated 25th June, 1929, the petitioner realised Rs. 1,97,025 from the reversioners of the Medur Estate towards the amount due to him under the decree. This amount was credited to the same folio in the accounts with the result that at the end of the year, this account showed an excess receipt of Rs. 1,50,399 (the difference between Rs. 1,97,025 realised in the year and Rs. 46,626 expended up to the end of the year). The Income Tax Officer treated this excess receipt as profits from business and as the petitioner's account were maintained on a cash basis so far as they related to his money lending business, the Income Tax Officer included the whole of such receipts in the petitioner's income from business and taxed it. An extract of the Income Tax Officer's order is appended, marked Exhibit A.

4. The petitioner's appeal to the Assistant Commissioner was unsuccessful. An extract of the Assistant Commissioner's order on this point is appended, marked Exhibit B.

5. The Petitioner than applied to me for a reference to the High Court. I held that no question of law arose and accordingly declined to state a Case to the High Court. A copy of my order is appended, marked Exhibit C.

6. On the petitioner's application to the High Court under Section 66 (3) the High Court has by its order dated 15th December, 1932, directed me to refer the following question and I refer it accordingly. "Whether the sum of Rs. 1,50,399 is assessable to tax?"

OPINION.

7. The petitioner contends that the receipt is of a capital nature since the transaction was an isolated one and did not arise from business as it had no relation to his ordinary business of money-lending. It cannot be said that this transaction was of a different nature from the petitioner's other transactions or that it was not entered upon as a matter of business. The petitioner is a money-lender and his business is to lay out money for profit. In this transaction the petitioner saw the chance of a favourable venture, purchased the rights of Appa Rao, in the legacies, defended himself in the suits brought by the creditors of Appa Rao, entered into litigation in respect of the amounts due to him under the rights that he had purchased and made a very large profit. The amount required to finance the venture was taken from the capital employed in the business. The mere fact that the transaction was an isolated one will not take it out of the category of business transaction. *Purushottamdas Thakurdas* v. *Commissioner of Income Tax* (2 I.T.C. 8) and *Lakshman Chettiyar* v. *Commissioner of Income Tax* (4 I.T.C. 200). In the circumstances

of this case, I am of opinion that the sum of Rs. 1,50,399 is assessable to tax and was rightly taxed."

The High Court asked for further details on the two points mentioned below and the Commissioner made a further report as follows:—"(1) When the assessee herein entered into the transaction in question what was there remaining for him to do and what did he do thereafter? When on 22nd March, 1926 the assessee purchased in Court auction in O. S. No. 24 of 1925 on the file of the Sub-Judge, Bezwada, the right, title and interest of Parthasarathi Appa Rao, in the legacies left by Venkayamma, the position was that the High Court of Madras had passed (on 4th April, 1922) a preliminary decree in O. S. No. 30 of 1916 (confirmed by Privy Council on 30th January, 1925,) declaring that Venkayamma had disposing power over the income of the Medur Estate during the period 4th August, 1895, to 9th March, 1899, and that the will executed by her and the dispositions made therein were valid and binding. Pursuant to this decree the then Sub-Judge of Bezwada took accounts but before passing the final decree he was transferred. His successor ordered a fresh enquiry and appointed a Commissioner to take accounts in respect of certain points by two separate orders dated 30th April, 1925. Parthasarathi Appa Rao (the plaintiff) filed two revision petitions (C. R. P. Nos. 423 and 424 of 1925) in the High Court against these orders and these petitions were pending when the assessee purchased the plaintiff's rights in the suit for Rs. 39,800. Though the amount of the legacies due to the plaintiff was over 3 lakhs, the upset price fixed by the Court was only Rs. 25,000. The assessee was the highest bidder and the sale was therefore confirmed in his name. After the assessee purchased the plaintiff's rights, he came on to the record as 2nd plaintiff in the suit and conducted the further proceedings in the High Court where the revision petitions were pending. These petitions were decided by the High Court in favour of the plaintiffs on 12th April, 1927. The defendants then applied for leave to appeal to the Privy Council. The assessee contested these applications and these were dismissed by the High Court on 2nd September, 1927."

Immediately after the purchase by the assessee one of the defendants in O. S. No. 30 of 1916 filed on 31st March, 1926 E. A. No. 364 of 1926 on the file of the Sub-Court, Ellore, to set aside the Court auction sale, on the ground that it was illegal. This application was dismissed on 12th November, 1926. Another petition E. A. 583 of 26 filed by a creditor of Parthasarathi Appa Rao for a similar relief was also dismissed on 14th December, 1926. On the dismissal of the abovesaid petitions they filed O. S. Nos. 93 of 26 and 7 of 27 on the file of the District Court, Ellore, for a declaration that the Court auction purchase by the assessee was fraudulent and nominal and a common judgment was delivered in those suits on 21st December, 1927, dismissing them and upholding the Court auction purchase. The assessee had to contest all the above

proceedings as the purchaser of the 1st plaintiff's (Appa Rao's) interest in the suit in order to protect his own interests.

The assessee then conducted further proceedings before the Sub-Judge, Bezwada, and obtained a final decree on 25th June, 1929. In confirming the preliminary decree of the High Court, the Privy Council gave costs to the plaintiff. The assessee as the assignee of the plaintiff's rights executed this decree of the Privy Council for costs. According to the final decree passed by the Sub-Judge, Bezwada, the assessee is entitled to receive Rs. 3,32,498. In partial satisfaction of this decree, the assessee received from the Court Rs. 1,97,025 during the year of account. This is credited to the account of his ledger, relating to this transaction. The debit side of this account shows the purchase price and expenses amounting to Rs. 46,625-15-0. The difference of Rs. 1,50,399 is the subject-matter of this reference.

(2) How much and in respect of what things did he incur expenditure? The total amount spent by the assessee in this venture is Rs. 46,625-15-0 as shown below.

	Rs.	A.	P.
Amount paid being the purchase price of 1st plaintiff's rights in O. S. No. 30 of 16 ...	39,800	0	0
Amount spent for conducting the further proceedings in O. S. No. 30 of 16 as 1st plaintiff's purchaser, in defending the petitions and suits impeaching the purchase and in executing the decree of the Privy Council for costs (trainage charges, Court fees, vakil fees, process fees, and other contingent charges) ...	6,825	15	0
Total ...	46,625	15	0

P. Venkataramana Rao, for the assessee.
M. Patanjali Sastri, for the Commissioner.

JUDGMENT.

BEASLEY, C. J.—The question referred to us is:

" Whether the sum of Rs. 1,50,399, is assessable to tax."

The facts of the case are that the assessee, who is a landowner and a money-lender and has an interest in certain cotton mills, purchased on the 22nd March 1926, in Court auction in O. S. No. 24 of 1925 on the file of the Subordinate Judge, Bezwada, the right title and interest of one Parthasarathi Appa Rao in the legacies left by one Venkayamma. The suit in which these legacies figure had been up to the Privy Council and the position at the time of the purchase was that the decision upholding Venkayamma's disposing power over the income of the estate and the dispositions made by her in her will had been upheld. The petitioner gave as purchase money Rs. 39,800. He was not able to realise his interest until

1929. There was somewhat protracted litigation between the date of the purchase and the date when he was able to get his money; and he had to take steps both by way of defending his position and of executing the decree which he had got in his favour, and incurred certain amount of law costs in doing so. However, eventually, during the year of account, he actually realised a sum of Rs. 1,97,025 from the reversioners of the estate in question towards the amount due to him under the decree. He had also spent Rs. 46,625-15-0 (Rs. 39,800 in respect of the purchase and Rs. 6,825-15-0 in respect of the further litigation to which reference has been made). Deducting that sum of Rs. 46,625-15-0 from the amount realised by him, there was left a sum of Rs. 1,50,399, which was treated as an excess receipt; and it was this sum which the Income Tax Officer held to be assessable to income tax; and the assessment has been upheld by the Commissioner of Income Tax. In this way the matter comes before us.

It is contended by Mr. Patanjali Sastri that, although this was an isolated transaction—as indeed it was and there is certainly no evidence of the assessee ever having entered into a transaction of a similar nature either before the date of this or after it—nevertheless this was an adventure or concern in the nature of trade. He argues that it was a speculation, that a very low price was given in comparison to the amount subsequently realised and that in that speculation the capital of the assessee was embarked. In our view this cannot be described as an adventure or concern in the nature of trade. The trading activites of the assessee were limited to lending money, owning land, if that can be called a trade, and having an interest in cotton mills and this is in no sense a transaction related to any of those activities. In this case the interest in the legacies was not even purchased from anybody who was indebted to the assessee in his money-lending business. It was an isolated transaction, although probably entered into by him as a speculation, as he happened to make a good profit out of it. We are quite unable to see that it has any connection whatever with any other trades or businesses carried on by the assessee. By itself the purchase of an interest in legacies, the subject of litigation cannot certainly be described as a trade or business. Reference has been made to the case of *Rutledge* v. *Commissioners of Inland Revenue* [14 Tax Cas. 490] by Mr. Patanjali Sastri in support of his argument. In that case the appellant was a money-lender who was also in 1920 interested in a cinema company. He had since that time been interested in various businesses. Being in Berlin in 1920 on business connected with the cinema company he was offered an opportunity of purchasing very cheaply a large quantity of paper. He effected the purchase and within a short time after his return to England sold the whole consignment to one person at a considera-able profit and it was held that the profits in question were liable to assessment to income-tax and to excess profits duty as being profits of an adventure in the nature of trade. The facts of that case are quite dissimilar to those here. There, what was purchased was

a quantity of toilet paper and it was a very large quantity, not a quantity which an ordinary person would buy for private use. It was of such a large quantity as clearly to make it a business transaction; and obviously the intention with which this large quantity was bought at an exceedingly low price was with the object of selling it later on at a favourable opportunity at an enhanced price and getting the benefit of the profit therefrom. This is quite clear, I think, from the judgment of LORD SANDS who says at page 497:

"The nature and quantity of the subject dealt with exclude the suggestion that it would have been disposed of otherwise than as a trade transaction. Neither the purchaser nor any purchaser from him was likely to require such a quantity for his private use."

The view we take, of the matter is that that case is certainly of no assistance to us, and that, with regard to this case, this was an isolated transaction in no way connected with any other trade or business activities of the assessee. That being so, we are unable to hold that it was an adventure in the nature of trade and if that is so, then the sum in question was not clearly assessable to income tax. The question referred to us must therefore be answered in the negative. Costs Rs. 250 to the assessee.

RAMESAM, J.—I agree.

KING, J.—I agree.

Reference answered in the negative.

[IN THE RANGOON HIGH COURT.]

COMMISSIONER OF INCOME TAX, BURMA

v.

V. S. A. R. FIRM.

Page, C. J., Mya Bu, J., and Mackney, J.

July 16, 1934.

REFERENCE—FRAMING OF QUESTIONS—DUTY OF COMMISSIONER TO STATE PARTICULAR POINT OF LAW THAT ARISES—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 66 (2).

It is the duty of the Commissioner in a case stated to set out specifially the particular point of law upon which it is sought to obtain a determination from the High Court.

Where the question referred was: "Whether on the facts of the case the sum of Rs. 23,373, was rightly included in the assessment," their Lordships returned the proceedings to the Commissioner in order that he may have an opportunity to refer the particular question of law which in his opinion arose in the case.

Case stated by the Commissioner of Income Tax, Burma, under Section 66 (2) of the Income Tax Act. [Civil Reference No. 8 of 1934.]

A. Eggar, for the Crown.

K. C. Bose, for the Assessee.

PAGE, C. J.—The question propounded is:

"Whether on the facts of this case the sum of Rs. 23,373 was rightly included in the assessment."

We are not disposed to answer a question framed in this general way. The question does not state under what provisions of the Act or upon what footing it is claimed that the sum is assessable to income-tax. If we were to consent to go into the matter in such circumstances the Court would be flooded with applications in which, without setting out a point of law, the Court would be invited to determine generally whether the conclusions of the income-tax authorities were correct or not. In other words, the Court would take upon itself the burden of investigating the facts for the purpose of finding out whether under any section of the Act a point of law could be extracted therefrom, and then determining it. That is not the scheme of the Act, and we decline to answer a question which in effect would amount to a general appeal from the income-tax authorities. It is the duty of the Commissioner in a case stated to set out specifically the particular point of law upon which it is sought to obtain a determination from the High Court. In the present case that has not been done. Let the proceedings be returned in order that the Commissioner may have an opportunity to state a case and refer the particular question of law which in his opinion has arisen.

MYA BU, J.—I agree.

MACKNEY, J.—I agree.

Proceedings returned.

[IN THE CALCUTTA HIGH COURT.]

THE HUNGERFORD INVESTMENT TRUST LTD., *In re.*

Costello and Lort-Williams, JJ.

July 20, 1934.

DIVIDENDS—EXEMPTION FROM TAX—DIVIDENDS PAID OUT OF PROFITS NOT TAXED IN COMPANY'S HANDS—WHETHER EXEMPT—INDIAN INCOME-TAX ACT (XI OF 1922), SECTIONS 14 (2) (*a*), 20 and 48.

Under Section 14 (2) (a) of the Indian Income Tax Act, sums received by way of dividends as shareholder in a company are wholly exempt from tax although a part of the dividend may have been paid out of profits which were free from taxation in the hands of the paying company. The assessee, the Hungerford Investment Trust Ltd. was a company registered outside British India and held the whole of its ordinary share capital in T.M. & Co. Ltd., a company registered in India. When T.M. & Co. were assessed in respect of its profits it was held to be exempt from taxation to the extent of Rs. 76,500 under Section 4 (1) of the Indian Income Tax Act. The whole of the profits made by T.M. and Co., including the sum of Rs. 76,503 was paid as dividends to the Hungerford Trust Ltd. The question being whether this sum of Rs. 76,500 paid as dividend was exempt from tax under Section 14 (2) (a) of the Act in the hands of the Hungerford Trust Ltd: Held, *that upon a proper construction of Section 14 (2) (a) the dividends in question were exempt from tax.*

PER COSTELLO, J.—*It is always the duty of the Court to interpret the language of the legislature as it stands and neither to add to it nor to take away from it.*

Case stated by the Commissioner of Income Tax, Bengal, under Section 66 (2) of the Indian Income Tax Act, (XI of 1922). [Income Tax Reference No. 12 of 1933.]

STATEMENT OF CASE.

Under Section 66 (2) of the Indian Income Tax Act, I am required by the Hungerford Investment Trust Limited (Assessee) to refer for the decision of the High Court the questions of law set out in Annexure A hereto, as arising out of the Appeal against their assessment for 1932-33. The Assessment Order, Grounds of Appeal, and Appellate Order are copied as Annexures B, C and D.

2. The gist of the issue is the taxation, in the assessee's hands of a certain proportionate part of dividends which they received from a company, Turner Morrison and Company. The legal provisions affecting the applicability of (ordinary) income tax and super-tax will need separate treatment. The appeal has used the general words "taxation", and "taxable", and seems to cover a claim that the sum in issue was wholly out of jurisdiction, and so to embrace both heads. The questions now set out use the general word "taxation" (Nos. 1 and 4) though they cite specifically only the provisions material in regard to ordinary income tax. I put the issue in the form of the first and second questions below.

First Question.—The assessee's income in assessment having included dividends declared on 16th April, 1931, and 3rd November, 1931, by a company whose profits of 1930 and 1931 were found to include specific sums to which in the company's hands in accordance with Section 4 of the Act did not apply, and the said company

having been assessed in respect of profits to which the Act did apply, in the assessee's hands in such proportion of the dividends, as the specified sums bear to the aggregate of all profits in 1930 and 1931 respectively, wholly outside the Act in accordance with Section 4?

Second Question:—The assessee's income in assessment having included dividends declared on 16th April, 1931, and 3rd November, 1931, by a company whose profits of 1930 and 1931 were found to include specified sums to which in accordance with Section 4 the Act did not apply, and the said company having been assessed in respect of profits to which the Act did apply, is such proportion of the dividends as the specified sums bear to the aggregate of all profits in 1930 and 1931 respectively, exempted from taxation to ordinary income tax in accordance with Section 14 (2)?

3. *Statement of facts*:—The assessee is a company registered abroad, whose income arises almost exclusively from the holding of the whole ordinary share capital in the Indian Company, Turner Morrison and Company, Limited.

The material part of the Assessment Order (Annexure B) is the calculation in respect of these dividends from Turner Morrison and Company, thus:

Dividend	Declared	Proportions allocated as being		
		Tax not payable Section 8, Proviso.(A)	Exempted under Section 4(1) in Company's hands. (B)	Taxed in Company's hands. (C)
		Rs.	Rs.	Rs.
(Final for 1930) 3 lakhs nett	16th April 1931	2% 6,000	13% 39,000	85% 2,55,000
(Interim for 1931) 1½ lakhs	3rd November 1931	1% 1,500	25% 37,500	74% 1,11,000
Rs. 4,50,000		7,500 Nett	76,500 Total Rs. 4,50,000	3,66,000

Add, under Section 16 (2), tax at rate current on dates above, (26 pies plus 12½ per cent.) on Rs. 3,66,000 ... (D) 65,779

Gross Dividends (Other sources) ... 5,15,779
Add, other income ... (E) 36

Total income ... Rs. 5,15,815

The taxation was worked out for ordinary income tax :—

		Rs.		Rs.
(*a*) Taxable	...	76,500	(B)	
		36	(E)	
				76,536
(*b*) Tax not payable under Section 8 (Proviso)			(A)	7,500
(*c*) Tax not payable under Section 14 (2)	...	3,66,000	(C)	
		65,779	(D)	4,31,779
			Total ...	5,15,815

For super-tax the whole Rs. 5,15,815 was taxed.
It is this Rs. 76,500 (B) which is in issue.

4. Turner Morrison and Company are assessed on profits of the previous calendar year. The 1931-32 assessment upon them on account of 1930 comprised a Total Income within the jurisdiction of Rs. 10,82,018. Besides this there was :—

		Rs.
In account sterling dividends received outside the jurisdiction four years before (of which the explanation will appear more fully below)	...	1,61,541
"Foreign" proportion of the dividends received from their own investment holdings (arrived at on the same principles as B above)	...	2,795
		1,64,336 (13 p.c.)
Add the above income within the jurisdiction.		10,82,018
		12,46,354

and of the Rs. 10,82,018, there was :—

Tax-free interest on securities (directly received)	...	1,108
Tax-free proportion of the dividends received from their own investment holdings (arrived at on the same principles as A above)	...	23,580
		24,688 (2p.c.)

These are the percentages applied as above to the dividend which Turner Morrison declared on 15th April, 1931. This dividend was declared as the "final dividend" for 1930 and was accounted out of the Profit and Loss Account (*i.e.*, Balance Account) as shown in their 1931 (December) Balance Sheet, of

which copy is Annexure E. The total dividend was less than the profits of the year.

5. To the November interim dividend for 1931, the percentage applied were similarly derived from the 1932-33 assessment of Turner Morrison upon 1931 account. I state the case upon the figures in that assessment as it now stands. I have to note that it may be reopened and altered but as the questions put are simple issues of interpretation this will not affect this reference materially.

6. That Assessment Order (which is copied, Annexure G) starts off from a figure "Profits as per Profit and Loss Account, Balance Rs. 6,67,571". The company had filed with their return, dated 10th June, 1932, a "Profit and Loss Account" (*i.e.*, working account), copied as Annexure F. This may be summarised :—

		Rs.	Rs.
1.	Expenditure general	13,85,129	
2.	Working profits, commission, &c.		15,43,465
3.	Dividends, Interest, etc. ...		5,09,235
4.	Balance to General Profit and Loss account ...	6,67,571	

This statement was not certified as audited. Apparently audited accounts and a Balance Sheet were subsequently available to the Income Tax Officer, but were not brought into the record.

With the above account there was also filed an analysis, "Statement of Interest on Securities taxed at source, included in the accounts for the year ended 31st December, 1931". This totalled Rs. 4,94,004 (included, it would appear, under item 3 above).

7. The assessment order brings in an additional sum of Rs. 1,72,500. This is not in issue but it may be as well to record the explanation, as it throws some light on the accounting of the items that are in issue. On the 5th July, 1932, the company wrote:

"In addition to the profit of Rs. 6,67,570-8-11 as shown in the Profit and Loss Account we also received a sum of Rs. 1,72,500 as a bonus on our holding of 1,725 shares in Alcock, Ashdown and Company, Limited. This amount has been held in suspense, and will be included in our Profit and Loss Account for the 12 months ending 31st December, 1932."

The balance sheets which I have now obtained in record (and of which Annexure E is the material one) do not show any separate "Suspense" item under that description. It seems that it was included within the head "Sundry creditors".

8. The above analysis (paragraph 6) included :—Dividends on Sterling Investments, exempt from taxation under Section 4 (2) of the Act, from Asiatic Steam Navigation Company :—

		Rs.	Rs.
for half year June 1927	...	53,382	
„ December, 1927	...	1,06,764	
„ June, 1928*	...	1,07,882	2,68,028

9. The following is an analysis showing how the figure adopted by Income Tax Officer was arrived at :—

		Rs.	Rs.
Profit originally accounted	...	6,67,571	
Various adjustments and additions under the Act	...	2,41,708	
		9,09,279	
Extract—Dividends, Security, interest, etc.	...		4,94,004
Deduct—Depreciation allowable	...		66,766
Assessed "Business" income (Section 10)	...		3,48,509
Total	...	9,09,279	

Dividends and Security interest:—

		Rs.
Amended detail statement	...	4,95,585
Further returned as above	...	1,72,500
		6,68,085

Security Interest (Section 8)		3,166	3,166
Add—Tax thereon (Section 18 (4))			425
Dividends in India (Section 12)		3,96,891	3,96,877(a)
Add—Tax thereon (Section 16 (2)) (Calculated upon 3,46,395 : see below			
Income Received without India		2,68,028	
Total income within India	...	6,68,085	8,10,259(b)

The Dividends in India were analysed thus :—

*Particulars given in original statement with the return. This is now said to be an error for "December, 1926." This detail need not be determined, *vide* paragraph 10. (Note added at correction of second proof).

(a) After deducting 14 as in Column 3 below.

(b) Actual total is 8,10,261 : negligible difference due to omitting annas.

Apportioned according to assessed-profit proportions:

	Untaxed under Section 4 (1)	Untaxed under Section 4 (3)	Tax-free Sec. 8 Proviso.	Taxed at source.	Total.
	Rs.	Rs.	Rs.	Rs.	Rs.
Shalimar Works...	33,937	...	7,059	4,254	
Shalimar Tax ...	1,754	...	73	71,273	
Retriever Flotilla	1,292	...	1,430	8,818	
Various ...	...	14	4,937	2,62,050	
Total ...	36,983	14	13,499	3,46,395	3,96,891

Apportionment of Profits :-

Foreign Income, untaxed under Section 4 (1) ...		Rs. 2,68,028	25 p. c.
" Agricultural " Income, untaxed under Section 4 (3) ...		14	...
Tax-free, under Section 8 Proviso...		13,499	1 p. c.
Taxed :—	Rs.		
At source ...	3,46,395 61,285		
In advance ...	3,166 425		
In assessment ...	3,48,509 36,983		
		7,69,768	74%
Aggregate Profits and Gains ... (*i. e.*, 8,10,262 plus 2,68,028 plus 14).		10,78,304	

These are the percentages brought into the present assessment in respect of the November dividend.

10. It may be as well to record—though as already noted I do not think it really material here—the details in this assessment which may need correction :—

(*a*) Simple arithmetical errors*

(*b*) The same question of law as is being here referred arises in respect of Turner Morrison's own received dividends ; and if the

*The " Foreign " proportion in respect of the Retriever Flotilla dividends received by Turner, Morrison and Company was taken at an incorrect figure of 11·2% (for 19·2%). Also, the Income Tax Officer worked out his figures by—

(*a*) subtracting from the returned figure the 4,94,004 for separate treatment ; and

(*b*) bringing in details from an amended statement which in addition to the above 1,72,500 rightly added (Paragraph 7), Totals 4,95,585.

present assessee should succeed in this case, Turner Morrison's assessment will be revised accordingly.

(c) I think the accounting of the foreign dividends which are the substance of this issue was on wrong lines. These three and four-year old receipts brought into account from suspense were not the material sums for the accounted period. They could only be "received" once—when they really were received; and the date when the assessee chose to bring them out of suspense in his Indian accounts has nothing to do with a proper accounting of his actual income of this year.

Possibly the Income Tax Officer was misled by the assessee's avoidance of the term "suspense" in regard to any of the sums. The way these foreign dividends were dealt with was this:—A closely allied English firm, Turner and Company, received the sterling dividends and put them into a "special suspense account" for the Indian Company, on which they allowed interest; and meantime the Indian concern had a running account with the Home concern with a debit balance, running more or less at the same level as these suspense credits. The balance of the suspense account only appears in the balance sheet as "Dividends on Sterling Investments."

The question whether this method of accounting did successfully evade the jurisdiction is an additional one which will also come under further examination.

Opinion of the Commissioner.

11. As already noted, the issues are direct questions of interpretation. I am not aware what contention the assessee makes or can make in regard to the first question. In regard to the second question he appears to contend that the words of Section 14 (2) (a) "......any sum which he receives by way of dividends where the profits or gains of the company have been assessed to income tax mean the whole of any dividends in respect of a year if such part of the company's profits of that year as are taxable have been assessed. The contention for the Revenue is that they mean the sum received within the whole dividend, corresponding to profits that have been assessed, (excluding that corresponding to profits which could not be assessed, because they were outside the jurisdiction). As an issue of fact, the parts corresponding to the assessed and the non-assessable profits are distributed upon the principles adopted in this case.

12. If the words as they stood simpliciter were capable of only one interpretation, the question would hardly be before your Lordships. The contention for the Revenue is that they are incapable of any other construction than the one submitted, having regard to the rest of the Act.

13. It is well established that a statute as a whole must be examined in order to see what is its main object and that any doubtful passages should be construed so as to effect the main

object rather than contradict or contravene it. I will try to set out the full relevant scheme of the Act.

14. The Act includes provisions for some measures of advance deduction on account, or "Deduction at source." These are to be distinguished and are not in issue.

The Act also includes provisions for the avoidance of levying the tax twice over upon the same accrual—it is important to avoid calling it the same "income"—and these provisions are commonly described as dealing with "Taxation at source." The example which is now in issue is that of a company, which is itself taxable on its income. The company (normally) pay dividends to its shareholders out of its income. These dividends then (normally) are income of the shareholders; and in the absence of any special provisions the shareholders would on the plain terms of the Act be taxable thereon in just the same way as on any other part of their income. But this position is adjusted by the section summarised below.

The sections referred to are :—

(*a*) Section 14 (2)—"The tax shall not be payable by an assessee in respect of any sum which he receives by way of dividends as a shareholder in a company where the profits or gains of the company have been assessed to income tax."

(*b*) Section 58 (1) makes the above not applicable to the charge of super-tax. The company pays super-tax (if otherwise liable) on its income; the shareholder similarly on his without allowance.

(*c*) The company pays tax at the maximum rate, and Section 48 (1) provides for bringing the effective rate against the shareholder down to whatever level may be applicable to the shareholder's total income, by a refund adjustment. This is not here in issue as the present assessee was himself taxable at the maximum rate. I suggest however that the wording is of considerable interest in the present connection, as follows :—

"If a shareholder in a company who has received any dividends therefrom satisfies the Income Tax Officer...........that the rate of income tax applicable to the profits or gains of the company at the time of the declaration of such dividends is greater than the rate applicable to his total income of the year in which such dividends were declared etc..." he gets a refund at the difference between the two rates against the amount of his dividends.

(*d*) Section 16—

"(1) In computing the total income of an assessee sums exempted under ... sub-Section (2) of Section 14........shall be included."

"(2) For the purpose of sub-Section (1), any sum mentioned in Clause (*a*) of sub-Section (2) of Section 14 shall be increased by the amount of income tax payable by the company in respect of the dividend received".

(*e*) "Total income" is defined in Section 2 (15) as "the total amount of income, profits or gains from all sources to which this Act applies............". The rate of tax applicable is under Section 3 determined by this total income; and ordinary income tax is charged on the amount thereof subject (*a*) to provisions setting out under head what the tax shall be payable and (*b*) various exempting clauses such as the Section 14 now in issue, which provide that tax shall "not be payable" on specified sums. The charge of super-tax is by Section 55 based upon the same total income but is not subject to the same exempting provisions.

15. The operative effect of these provisions— but certainly not, I think, the extent of the meaning of words—is necessarily subject to the extent of application of the Act, as defined in Section 4. Subject to specified exceptions this section applies the Act—(*a*) to "all income, profits, or gains......accruing or arising or received in British India" and (*b*) also to income deemed so to accrue, under various sections. Of these, the only item relevant is that in sub-Section (2) of this Section 4, dealing with "business" income accruing without British India, received subsequently in British India. (Although the applicant's questions as drafted raise the point, nothing can turn at the present stage on whether these dividend-receipts were "business" income).

16. The essential position is that the dividends in issue accrued to and were received by the assessee in British India and were his income within the jurisdiction of the Act and taxable except in so far as there is something in the Act which he can point to as taking them out of taxation. An accrual which in the hands of the company is not liable to income tax by reason only of the fact that it was not received by the company in British India may yet be liable to income-tax in the hands of the shareholder if it accrues to or is received by the shareholder in British India. It is true that the department has always held that where income is exempt in the hands of the company by reason of its being income of a particular character, *e.g.*, agricultural income or income from tax-free securities, it retains that character even when it is passed on to the shareholder and is consequently exempt in his hands also. The position in this respect is that a dividend represents merely the shareholder's share in the income of the company with the result that the shareholder's share in the agricultural income of the company or income from tax-free securities remains agricultural income or income from tax-free securities in the hands of the shareholder. This argument cannot, however, be applied to income which, not being itself the subject of any specific

exemption, is merely escaping assessment in the hands of the company because of the place of receipt of the company, since the income is in fact received by the shareholder in British India; and it cannot be said that the place of receipt by the company, constitutes a characteristic of the income which is retained, against the actual place of receipt by the shareholder, when the income passes on to the shareholder. It is on these principles that the system of adjustment which has prevailed in the department for many years is based; and this system of adjustment is exhibited in the details of the calculation included in the statement of facts. If it should be held that the distinction here drawn between income that is specifically exempt and income that has merely escaped assessment is not a sound one, then I submit that the conclusion is not that the latter class of income is exempt in the hands of the shareholder, but that the departmental practice in respect of the former class has been generous to an extent not justified by the law. Hence I think that the answer to the first question is in the negative: and super-tax is rightly levied on the full amount of the dividends.

17. As to the question whether Section 14 (2) makes ordinary income tax not payable by the dividend-receiver in respect of a proportion corresponding to what was foreign income in the company's hands, it will not be necessary to expand the proposition that there is no essential co-relation between the profits and the dividends: still less between the assessable profits and the dividends. The profits usually—not always, but they certainly did so in the present case—stand earmarked as such on one side of the balance-sheet, in an aggregation of the previous balances and the current year's profits. The year's dividends are paid out of the assets but there was never any isolated slab of assets corresponding to those profits, still less to a particular part of them. I draw attention to the wording of the 4th ground of appeal stating that no part of the dividends was paid out of the foreign funds. This would seem to me completely contrary to the first part of applicant's case, but I suggest that it is not possible to say what funds they were paid from. Payments are made out of one pool of liquid assets, on account of one liability or another. There is no separated pool of profits, still less of each separate type of profits. They are merely accounted against them

18. The framers of the Act appear to have left this very difficult relation of the dividends and the profits to be wholly determined as facts, and to have proceeded on the basis that they are so determined. Otherwise what possible meaning could attach to the concluding words of Section 16 (2)—no income tax is literally payable by the company in respect of any of its dividends: it is payable in respect of its (assessable) profits. Similarly, Section 8 cannot have meant that tax which had never been paid by the company should be given away by the Revenue in every refund case of a shareholder in a company with any non-assessable profits. There is no workable construction of the Act which does not, wherever

dividends and profits are mentioned together, put the two in relation—the dividend which corresponds to the described profits, and the profits which correspond to the described dividends.

19. A construction based on regarding all the clauses in Section 14 as in *pari materia* will lead to just the same interpretation: under Section 14 (2) (*c*) the language is almost identical, putting the appropriate words "share of profits" in place of "by way of dividends". Here the wording goes, "where such profits have been assessed". The word "such" could not find a grammatical place in Clause (*a*), but it is impossible to construe the clause in neglect of it. When the words are "the profits", at once the question arises, what profits?—all the profits (since the company was formed) the profits of the previous year, or (as the assessee wants to have it) that part of them which could be assessed, the profits of the year in which the dividend was paid? The construction in *pari materia* gives an answer, the only one that I can see. It is the answer which fits in with the whole scheme, and—it is not irrelevant to observe—yields an equitable result over the whole range of this complicated field.

20. Without any prejudice to the positive line of construction above, I may make a negative criticism of the assessee's construction. I gather that he leaves the difficult relative "where" as self-explanatory: and argues that "the profits or gains" can only be those to which the Act applies—and these (at any rate for that year) were assessed. That sounds plausible, superficially; but this is not a section applying to those profits: it is a section applying to the tax upon the assessee. I can see no more reason to restrict the word "profits" thus, than (say) to restrict it to meaning "profits of the year in which the Act was passed". Indeed I see nothing to restrict the natural interpretation of "the profits" as the company's profits—all the profits: and quite certainly all the company's profits were not assessed.

I think the answer to the second question should be in the negative, and the amount in issue held to be taxable to ordinary income tax in the assessee's hands, as not falling within the exemption.

21. This statement of the case is submitted for your Lordship's decision".

The case was heard by BUCKLAND, COSTELLO and PANCKRIDGE, JJ., on 12th and 13th February 1934 and on the 13th March 1934 their Lordships delivered the following judgment :—

BUCKLAND, J.—The Commissioner of Income Tax, Bengal' has referred under Section 66 (2) of the Income tax Act two questions arising out of an appeal by the Hungerford Investment Trust Ltd., against their assessment for the year 1932-33.

The assessee is a company registered outside British India and it holds the whole of the ordinary share capital in Turner Morrison

and Company Limited, a company registered in India. For the year 1930 Turner Morrison and Company declared on the 16th April 1931 a final dividend of 3 lakhs of rupees and on the 3rd November 1931 an interim dividend for the year 1931 of 1½ lakhs. These dividends were paid to the Hungerford Investment Trust Ltd., and with the exception of some trifling sums represent the whole of its income for the year 1931-32 upon which it has been assessed to income tax for the year 1932-33.

Turner Morrison and Company's assessment for the year 1931-32 was made on its profits for the year 1930 and that company was held under Section 4(1) of the Act to be exempt from tax to the extent of 13 per cent of such profits on the ground that they had not been received in India. It was also held exempt to the extent of 2 per cent. under the proviso to Section 8. When the same company was assessed in 1932-33 in respect of its profits for 1931 it was held exempt under Section 4(1) to the extent of 25 per cent. of its profits and under the proviso to Section 8 to the extent of 1 per cent.

These dividends having been paid to the assessee in the year 1931, the assessee, on being assessed for the year 1932-33, claimed to be exempt as regards the dividend of 3 lakhs declared on the 16th April, 1931, to the extent of 13 per cent. and as regards the dividend of 1½ lakhs declared on 3rd November, 1931, to the extent of 25 per cent. The sum of Rs. 76,500 is in issue. There is a practice of the Income Tax Department whereby a shareholder's share in the income of a company which is exempt from the assessment to income tax and which he receives in the form of dividends remains exempt from assessment on the same ground, whatever such ground may be, but such practice finds no sanction in the Act. In this instance the Income Tax Department has refused to follow such practice on the ground that it cannot apply, if, as is said to be the case here, the income of the dividend paying company has not been assessed to income tax by reason of it not having been received in British India.

We are not concerned with the practice of the Department and it is not necessary for the present purpose to express any opinion in regard to it. The only question to be considered is whether the assessee's claim not to be assessed to income tax on the sum of Rs. 76,500 is well founded. The claim is based upon Section 14 (2) (*a*) of the Act. It is argued that as the sum in question was received by way of dividend as a shareholder in Turner Morrison and Co., Ltd. of which company the profits or gains have been assessed to income tax, therefore the assessee is not liable to be assessed as regards such dividends. It is further contended that it is enough that the dividend paying company should have been assessed, and that, having been assessed, it is immaterial whether a part of its income was not assessed to income tax by reason of Section 4 (1), as it did not form part of its total income as defined in the Act. The fact of the assessment alone is, it is submitted, sufficient to attract the operation of the

section. The Crown's reply to this is that the profits of Turner Morrison and Co., Ltd., enabling the dividend to be paid have not been assessed and therefore the sum of Rs. 76,500, if the argument advanced were accepted, would escape assessment both in the hands of the dividend paying company and in the hands of the present assessee. The Commissioner of Income-tax in his reference has formulated and applied the view which he has expressed as follows :—

"There is no workable construction of the Act which does not, wherever dividends and profits are mentioned together, put the two in relation—the dividend which corresponds to the described profits, and the profits which correspond to the described dividends."

If by this the Commissioner intends to refer to dividends and profits for the same year or for periods so near to each other that the one is in immediate relation to the other, he has in my opinion taken too narrow a view of the matter, for one cannot exclude the possibility of the section being applied to a case where dividends are paid in excess of the profits for the year, the balance being made up of reserve funds which may have been long since set aside.

On behalf of the assessee Mr. Page has said that the dividends paid to the assessee in fact were paid out of profits made in India and therefore had already been assessed to income-tax, and if this is so, the Crown, the learned Advocate-General informs us, would not contend the matter further. As to this the position is by no means clear. The Income Tax Officer in his assessment order has stated that a part of the profits out of which the dividends were paid was earned outside British India and as such was not taxed. In their grounds of appeal the assessees say that "Even assuming as is alleged, but not admitting, that such sum represents a portion of the profits or gains of the business of the company from whom your petitioners received the same, such sum accrued or arose or was received without British India, and was not received in, and has never been brought into British India, and as such was not liable to taxation in the hands of such companies."

What has been so stated on behalf of the assessee is an inference we are asked to make from the principles that a company may only pay dividends out of the profits, that Messrs. Turner Morrison and Co.'s. profits to the extent of 13 per cent. and 25 per cent. in the years in question were not brought to India, and that profits made in India have at all times been assessed to income-tax but there is no finding of fact by the Commissioner in this respect. The Commissioner has touched upon this aspect of the matter but if I may venture to say so he has impressed himself so heavily with the proposition for which I have already quoted a passage from his reference that he has lost sight of what may be the real solution of the matter, nor, at the same time, does it appear that the assessee

made any attempt to show that the dividends were paid out of Turner Morrison and Co.'s profits which had already been assessed to income tax.

Where two companies are related to each other in the manner in which Turner Morrison and Co., Ltd, and the assessee undoubtedly are related, such an investigation should be possible. It may not be possible in all cases and where it cannot be made it may become necessary to decide the point raised by the second question irrespective of the financial arrangements of the dividend paying company. But in this case if it should appear that the sums received by the assessee by way of dividends have been paid out of income, profits or gains of Turner Morrison and Co., Ltd., which have been assessed to income tax, then, on the statement of the learned Advocate-General, no further question will arise, and the question whether an assessment to income tax of the profits and gains of the dividend paying company *per se* results in dividends paid to a shareholder not being assessable to income tax under the provisions of Section 14 (2) (*a*) need not be determined.

To refer this question back to the Commissioner is not, I concede, strictly necessary for the determination of the point of construction embodied in the question submitted for our opinion but in the absence of any finding of fact in regard to it the question submitted is to a great extent if not entirely founded upon hypothesis and it is not the duty of the Court to express an opinion upon a question which, the facts being hypothetical, is but an abstract point of law.

The order will be that the case be referred back to the Commissioner for a finding of fact whether the whole or any part, and, if a part, what part of the dividends amounting to Rs. 76,500 paid by Turner Morrison and Co., Ltd. to the assessee were paid out of the profits or gains of Turner Morrison & Co. which have at any time been assessed to income tax.

COSTELLO, J.:—For the reasons given by my Lord I agree that this case must be sent back.

PANCKRIDGE, J.:—I regret that for reasons which I am about to state I find myself unable to agree with my learned brothers.

In my judgment the material facts are as follows:—

Turner Morrison & Co. Ltd. to which I propose to refer as "the company," is registered in India. Its entire share capital is held by the assessee. The assessee is not registered in India, but is a company within the meaning of Section 2 (6) of the Indian Income Tax Act. In the calendar year 1930 the company made a profit of Rs. 12,46,354. Of this 2 per cent. represents interest on Government tax-free securities, on which no income tax is payable in virtue of the first proviso to Section 8 of the Act. A further 13 per cent. represents income, profits, or gains, which have not accrued, or arisen, or been received in British India, and which

are therefore under Section 4 (1) not income, profits or gains, to which the Act applies. The remaining 85 per cent. is income, profits or gains, within the meaning of the Act and has been duly assessed to tax.

On 16th April, 1931, the Company declared a final dividend of Rs. 3,00,000 in respect of 1930, which was received by the assessee in India. In the tax year 1931-32 the assessee received a further sum of Rs. 1,50,000, declared by the company as an interim dividend for the year 1931. In that year the income, profits or gains of the company were made up as follows: 1 per cent. interest on tax-free securities; 25 per cent income, profits or gains, not accruing, or arising or received in British India; 74 per cent. income assessable to tax. The two dividends represent practically the entire income of the assessee for the tax-year 1931-32. In connection with the assessment of the assessee for 1932-33 the Commissioner of Income tax, Bengal, has, as required by the assessee referred two questions of law to the Court with his own opinion thereon. With the first question we need not concern ourselves. On its answer depends the amount of the assessee's income which is assessable to super-tax. Learned counsel for the assessee however, now states that he does not wish to attach the assessment to super tax, and that, in conformity with the opinion of the Commissioner, the first question must be answered in the negative.

The second question is framed as follows:

"The assessee's income in assessment having included dividends declared on 16th April, 1931, and 3rd November, 1931, by a company, whose profits of 1930 and 1931 were found to include specified sums, to which in accordance with Section 4, the Act did not apply; and the said company having been assessed in respect of profits to which the Act did apply; is such proportion of the dividends as the specified sum bear to the aggregate of all profits in 1930 and 1931 respectively, exempted from taxation to ordinary income tax in accordance with Section 14 (2) (*a*)?" The question may be put in another way. "Is the sum of Rs. 76,500 assessable to income tax in the hands of the assessee, of which sum Rs. 39,000 bears the same proportion to the final dividend for 1930 as the "foreign income" of the company bore to its total income, profits or gains, in that year, and Rs. 37,500 bears the same proportion to the interim dividend for 1931 as the "foreign income" of the company bore to its total income, profits or gains in that year?"

In my opinion, the language of Section 66-A makes it clear that the Court has jurisdiction to refer a case back to the Commissioner, only when it is not satisfied that the statements in the case referred are sufficient to enable it to determine the questions raised thereby. I am satisfied that the statements in the case are quite sufficient for the purpose of the question raised, and I consider that the findings, to which the Commissioner is to be directed to come, are unnecessary because I can find in the Act no ground for

supposing that the liability of a shareholder to pay income tax on dividends received by him depends in any degree upon the origin or nature of the profits, which enable the company to pay the dividends, or upon the character of the fund out of which payment is in fact made.

The question to my mind is purely one of the construction of Section 14 (2) (*a*) of the Act, which is as follows:

"The tax shall not be payable by an assessee in respect of any sum which he receives by way of dividend as a shareholder in a company where the profits or gains of the company have been assessed to income tax."

Have the profits or gains of the company in this case been assessed to income tax within the meaning of the Sub-Section? If they have, no income-tax is payable on the dividend. If they have not, the assessee is liable to pay the tax, not only on that part of the dividend which the Commissioner thinks should be assessed, but on the entire dividend, for unquestionably it is income, and there is no other section of the Act under which it can be suggested that it escapes liability.

The Advocate-General concedes that this is so, and that in all cases where some fraction of a company's profits have not been taxed it is only because of the generosity of the income tax authorities that the shareholders are not assessed on their dividends. As to that it is enough to say that the business of the income tax authorities is to collect the revenue in accordance with law, and feelings of generosity ought not to deter them from so doing. The argument for the Crown is that the conditions of Section 14 (2) (*a*) are only satisfied when all the profits or gains of the company have been assessed, and this can only happen where all such profits or gains are in fact assessable. If that view is correct some startling results will follow.

I suppose there is not a bank or an insurance company in India which does not hold Government tax-free securities. It will be a shock to the shareholders in such Corporations to learn that their dividends are assessable to income tax. Moreover, I do not see how it is possible to avoid the conclusion that the assessable portion of the company's profits will pay tax twice, once when it is assessed as profits in the hands of the company, and again when it is assessed as income in the hands of the shareholder.

In my opinion it is impossible to confine the provisions of the sub-section to those companies whose total profits or gains are assessable to income tax. In other words, to give a reasonable construction to the sub-section "profits or gains" must mean assessable profits or gains.

I appreciate the fact that it is possible that by keeping profits abroad, and by paying dividends by means of credits available in India against such profits, companies may be able to safeguard from liability to tax, sums which should not in accordance with the

general policy of the Act, escape. The answer is that if this is so, the legislature must take steps to prevent it, a matter that I imagine would not require any exceptional degree of ingenuity.

In my opinion this reference should be disposed of by stating in reply to the second question that the entire dividend is exempt from income tax under Section 14 (2) (*a*) and that therefore no fraction of it is assessable.

In pursuance of the above Judgment of the Court the Commissioner of Income Tax made the following :—

SUPPLEMENTARY STATEMENT OF CASE UNDER SECTION 66 (4) OF THE INCOME TAX ACT.

"This case was referred back to me for a finding whether the whole or any part, and if a part, what part of the dividends amounting to Rs. 76,500 paid by Messrs. Turner Morrison & Co., Ltd., to the assessee were paid out of the profits or gains of Messrs. Turner Morrison & Co., Ltd., which had at any time been assessed to income tax. The assessee admits that it is impossible to prove that any of those dividends have been paid out of such profits and in the circumstances is prepared to admit that no part of this sum was paid out of such profits. My finding on the question is in accordance with the assessee's admission."

The case was heard by COSTELLO and LORT-WILLIAMS, JJ.

Mr. Pugh, for the assessees.

The Advocate-General and *Dr. Radha Binod Pal*, for the Commissioner.

JUDGMENT.

COSTELLO, J.:—This matter came before the Court on a reference under Section 66 (2) of the Income Tax Act (Act XI of 1922), the Commissioner of Income Tax having been required by the company known as the Hungerford Investment Trust, Limited, to refer for the decision of this Court certain questions which are set out in Annexure "A" of the case. The questions originally propounded by the applicant were stated in this form : (1) Is the sum of Rs. 75,536 which has been assessed to tax in the hands of Messrs. The Hungerford Investment Trust, Limited, liable to taxation in their hands, or at all? (2) In view of the fact that the said sum is a portion of the dividends received by Messrs. Hungerford Investment Trust, Ltd., from companies whose profits and gains had been assessed to income tax, is not the said sum exempt from taxation in the hands of Messrs. The Hngerford Investment Trust, Ltd., by reason of the provisions of Section 14, sub-Section 2 (a) of the Indian Income Tax Act, 1922? (3) Where the profits or gains of a company have been assessed to income tax, are not all dividends paid by that company exempt in the hands of a shareholder irrespective of the income which has been assessed? (4) In view of the fact that a portion of profits or gains of certain companies were not received in or brought into British India and as such were exempt from liability to taxation in the hands of such companies, can Messrs.

The Hungerford Investment Trust, Limited, be assessed on a similar amount merely because they have been paid dividends to that amount by the respective companies?

What we are now concerned with however, is the "Second Question" stated by the Commissioner in paragraph 2 of the statement of case (p. 1 of the paper-book). The assessment in dispute is that for the tax year 1932-33. The Hungerford Investment Trust, Limited, is a Company registered outside British India and it holds the whole of the ordinary share capital in a company known as Messrs. Turner Morrison and Company, Limited, which is a company registered in British India. For the year 1930 Messrs. Turner Morrison and Company Limited on the 16th Aprill 1931 declared a final dividend amounting to three lacs of rupees and on the 3rd of November 1931 that company declared an *interim* dividend for the year 1931 amounting to Rs. 1,50,000. These dividends were all paid, that is to say the total sums were paid to the Hungerford Investment Trust, Limited, and it appears that, with the exception of some insignificant amount in addition, that sum represents the whole of the income of The Hungerford Investment Trust Limited, for the year 1931-32 upon which it was assessed for the tax year 1932-33. Messrs. Turner Morrison and Company's assessment had been made on the basis of its profits for the year 1930 and that company was held under the provisions of Section 4 (1) of the Income Tax Act, XI of 1922, to be exempt from tax to the extent of Rs. 39,000 which is 13 per cent. of its total profits and further the amount of the profits or gains made by Messrs. Turner Morrison and Company, Limited, but not received in India were also held to be exempt. A sum equivalent to Rs. 6,000, that amount being 2 per cent. of its total profits was also held to be exempt under the proviso contained in Section 8 of the Act. Accordingly when Messrs. Turner Morrison and Company, Limited, were assessed for the tax year 1932-33 in respect of its profits for the year 1931 it was held to be exempt from taxation under Section 4 (1) to the extent of Rs. 37,500, that is to say, 25 per cent. of its total profits and under the proviso to Section 8, to the extent of Rs. 1,500 which is one per cent. of its total profits. The two exemptions under the provisos to Section 8 amounted to a total sum of Rs. 7,500 and the two exemptions under Sections 4 (1) to a total sum of Rs. 76,500. Messrs. Turner Morrison and Company, Limited, suffered taxation—if I may use the expression—on the residue, that is to say, in respect of the profits out of which the first dividend was paid, to the extent of a sum of Rs. 2,55,000 which is 85 per cent. of its total profits and in respect of the profits out of which the *interim* dividend was paid to the extent of Rs. 1,11,000 which is 74 per cent. of its total profits for the year in question. Messrs. Turner Morrison and Company Limited were not taxed either in regard to the sum of Rs. 7,500 by reason of the proviso to Section 8 or in respect of the sum of Rs. 76,500 in regard to which they were exempted by reason of the provisions of Section 4 (1) of the Act. The question before the Court is therefore only concerned with this sum of Rs. 76,500

which passed from Messrs. Turner Morrison and Company, Ltd., into the hands of The Hungerford Investment Trust, Limited, as part of the total dividends paid to them on the 16th April, 1931, and 3rd November 1931.

Now the income-tax authorities made an assessment upon Messrs. Hungerford Investment Trust, Limited, designed to bring in for the purpose of taxation this sum of Rs. 76,500. They did not seek to make The Hungerford Investment Trust, Limited, liable in respect of the sum of Rs. 7,500. The method by which the assessment was made and the figure arrived at is shown in Annexure "B" which is a copy of the assessment order made on The Hungerford Investment Trust Company for the tax year 1932-33.

The assessee thereupon put forward the questions which as I have already said are contained in Annexure "A". But quite shortly the main point which was raised by the assessees in the objection which they took as regards the assessment to income-tax amounts to this namely, whether they are or are not liable to pay any income-tax on the sum of Rs. 76,500 even though that sum has not been taxed at all as part of the profits or gains of Messrs. Turner Morrison and Company from whom they have received that sum as part of the larger sum they received by way of distribution of dividends. When the matter was before this Court on the last occasion the Court was differently constituted and the Court by a majority thought it desirable to have a further finding of fact from the Commissioner of Income Tax in order to make clear the question whether the whole or any part, and if a part, what part of the dividends paid to the assessees to the extent of Rs. 76,500 had been paid out of profits or gains of Messrs. Turner Morrison and Company which had at any time been assessed to income-tax. We have now before us the answer given by the Commissioner on that point. In it the Commissioner says "The assessee admits that it is impossible to prove that any of these dividends have been paid out of "such profits and in the circumstances is prepared to admit that no part of this sum was paid out of such profits". Then he adds: "My finding on the question is in accordance with the assessee's admission". The admission referred to in the finding of the Commissioner, comes to this that the sum of Rs. 76,500 had never been taxed at all, while it lay in the hands of Messrs. Turner Morrison and Company as part of their total profits and gains. The position, therefore, is that Messrs. Hungerford Investment Trust, Limited, received a total sum by way of dividends which included in it the sum of Rs. 76,500 which had not been taxed before it came into their hands, and although there were four questions propounded by the applicant, they all, for our present purpose, resolve themselves into the simple question of whether The Hungerford Investment Trust, Limited, are liable to pay tax in respect of that sum of Rs. 76,500 or whether on the other hand, they are protected by reason of the provisions of Section 14 (2) (a) of the Income Tax Act, XI of 1922. That is the question which we have to answer in this case.

The position now is very little different, if at all, from what it was when the matter was before this Court on the previous occasion. The only difference is that it is now definitely established from the finding of the Commissioner that the sum of Rs. 76,500 has not in fact been subject to tax at all. A great deal of argument was put forward on the previous occasion as to the origin and the method of dealing with various sums of money received by Messrs. Turner Morrison and Company as part of the profits and gains of their business operation. In my opinion all that was not very material. The sole question is whether the terms of Section 14 (2) (a) are sufficiently precise and definite to afford to the assessee the protection which they claim. The words of the sub-Section are these: "The tax shall not be payable by an assessee in respect of any sum which he receives by way of dividends as a shareholder in a company where the profits or gains of the company have been assessed to income tax." Quite clearly, this sum of Rs. 76,500 was received by the assessee by way of dividends as a shareholder in a company, namely, as a shareholder in the company known as Messrs. Turner Morrison and Company. There is no doubt in one sense at any rate that the profits or gains of that company had been assessed to income tax. I have already endeavoured to explain to what extent those profits or gains were so assessed. As regards the sum earned in 1930 which provided the dividend declared on the 16th April, 1931, Messrs. Turner Morrison and Company were taxed, as I have stated, to the extent of 85 per cent. of their total profits or gains and as regards the total sum out of which the dividend of Rs. 1,50,000 was declared on the 3rd November, 1931, Messrs. Turner Morrison and Company were taxed to the extent of 74 per cent. It follows, therefore, in my opinion that this was a case where the company which paid the dividend was in the position of having had some profits or gains assessed to income tax. The only further question and indeed the crucial question in the whole matter is whether the section implies that unless the whole income of a company had been assessed or made chargeable to income tax the section will not operate for the protection of a shareholder—whether an individual or a company—receiving a dividend paid out of the total profits or gains of the other company.

It is argued by Mr. Page on behalf of the assessee, the applicants before us, that it is sufficient for the purpose of this section that Messrs. Turner Morrison and Company were assessed in respect to the whole of that part of their profits or gains which were liable to tax. It is conceded on behalf of the Commissioner that in the one instance 15 per cent. and in the other 26 per cent. of the total profits or gains were beyond the reach—if I may use the expression—of the income tax authorities altogether. Therefore, it may be said that in regard to those proportions of the profits there could not be assessment because that portion was not liable to income tax at all.

The learned Advocate-General on behalf of the income tax authorities has asked us to take a comprehensive view of the whole

scheme of the Income Tax Act for the purpose of interpreting the real meaning of Section 14 (2) (a) and in particular he has referred us to Section 48 which provides for a refund to a shareholder who is not liable to income tax at the rate at which tax has been paid by the company from whom he has received his dividend or who is not liable to income tax at all by reason of his total income being below the taxable amount. The learned Advocate-General has also referred us to Section 20. That section in effect provides the machinery whereby a refund can be claimed because it requires that the principal officer of every company shall at the time of a distribution of dividends, furnish to every person receiving a dividend a certificate to the effect that the company has paid or will pay income tax on the profits which are being distributed, and specifying such other particulars as may be prescibed. By Rule 14 the form of the certificate is laid down and the form runs thus: " We hereby certify that income tax on the entire or such part as is liable to be charged to Indian income tax of the profits and gains of the company, of which this dividend forms a part, has been or will be duly paid by us to the Government of India." The learned Advocate-General has argued that the certificate is only wide enough in its terms to cover the situation on the one hand where the income tax has been paid on the entire profits or gains or on the other, where the income tax has only been paid on such part as is liable to be taxed. The extent of those two alternative situations must be taken to indicate says the learned Advocate-General that the Act as a whole contemplates a situation where the dividends are paid out of the sum the whole of which has suffered tax in the case of a company which has distributed it by way of dividends. We are asked to say that the real meaning and intent of Section 20 and the subsequent sections and in particular Section 48 is such as to warrant and indeed entail the conclusion that Section 14 (2) (a) ought to be construed as meaning that tax (?) only not be payable by an assessee in respect of any sum he has received by way of dividends as a shareholder in a company where the whole of that sum is included in, that is to say, has been paid out of the profits or gains of the company the whole of which has already been assessed to income tax. That would be, in our opinion, to read into the section something which is not there. We think we ought not in effect to add to the plain words of this section by reference to the supposed implications of other sections of the Act. It may be that there are inconsistencies between Section 14 (2) (a) and what is implied in the subsequent Sections 20 and 48. That may be the position, though we do not think we ought to take the form of the certificate as giving an indication of what is the meaning of an antecedent section of the Act itself. Therefore, giving to the words of Section 14 (2) (a) their plain meaning and without adding to or subtracting from the precise words of the section itself we are bound to come to the conclusion, whatever the result may be, that there has been an assessment on the profits or gains of the company which is sufficient to secure to the shareholders the whole of

the dividends even though those dividends were in fact to some extent paid out of profits or gains in the hands of the paying company which were free from taxation altogether. No doubt the intention of the legislature was to provide against double taxation—taxation in the hands of the company which passed the dividend and taxation in the hands of the shareholders who received the dividend. We have, however, on many occasions expressed the view that it is undesirable and indeed unsafe for this Court or any other Court in an endeavour to meet a particular situation to vary the words of a statutory enactment for the purpose of giving effect to what may presumably have been the intention of the legislature. I hold that it is always the duty of the Court to interpret the language of the legislature as it stands and neither to add to it nor to take away from it. In the circumstances, I am bound to say that from the wording of the section as they are the profits or gains of Messrs. Turner Morrison and company had been assessed to income tax in the relevant year and that, therefore, the sums received by Messrs. Hungerford Investment Trust, Limited as shareholders in that company are sums on which tax should not be payable. I do not feel it necessary to answer *seriatim* all the questions propounded by the applicants in Annexure "A" because in my opinion, my answer in the affirmative to the second question "Is any portion of the dividends received by Messrs. Hungerford Investment Trust, Ltd., ...exempt from taxation......by reason of the provisions of Section 14 (2) (*a*) of the Income Tax Act" is sufficient to cover the other questions also.

Each party will bear its own costs in the previous proceedings and the assessees will have their costs of this appeal.

LORT-WILLIAMS, J.—I desire to adopt some of the words and observations of my learned brother Mr. Justice Panckridge contained in the concise and apposite judgment which he delivered when the matter was before this Court on a former occasion. There is nothing in the Act to show that the liability of a shareholder to pay income tax on dividends received by him depends in any degree upon the origin or nature of the profits which enable the company to pay the dividends or upon the character of the fund out of which payment is in fact made.

The question is purely one of construction of Section 14 (2) (*a*) of the Act. The first matter to be decided is, whether the profits or gains of the company in this case were assessed to income tax within the meaning of the sub-section. If they were, then no income tax is payable on the dividend received by the shareholder. If they were not so assessed, then the shareholder is liable to pay income tax, not only on that part of the dividend which the Commissioner thinks should be assessed but on the entire dividend. There is no other section of the Act under which it can be suggested that he escapes liability.

The result, as pointed out by my learned brother Mr. Justice Panckridge, of accepting the argument raised on behalf of the

income tax authorities would be, that if any fraction of company's profits have not been taxed, the shareholder who has received a dividend from that Company would be unable to avail himself of the provisions of Section 14 (2) (*a*). In other words, what is contended on behalf of the income tax authorities, is, that unless the whole of the profits or gains of the company have been assessed, the dividend-receiver cannot avail himself of the provisions of the section. The result would be that the section would only be available to the shareholder, in this or in similar cases, when the whole of the profits or gains of the company were in fact assessable to income tax.

Such a result need only be stated to show that this cannot possibly have been intended by the legislature, for, as pointed out by my learned brother, in every case where a bank or an insurance company hold any tax-free securities, the shareholders of such companies would find that their dividends were assessable to income tax. Moreover, the conclusion would result in the assessable portion of the company's profits being made liable for the tax twice, once as profits in the hands of the company, and for a second time as income of the shareholder.

I agree that the interpretation of the section may enable certain individuals or companies to escape payment of income tax, which it is the obvious intention of the legislature that they should pay. But it is not for this tribunal to remedy that fault. We have to declare the law as it appears in the Income Tax Act and must leave the legislature to consider what steps they may think it necessary to take by way of amendment of the Act, so as to provide for cases similar to this.

I agree with my learned brother in the answer he has given to the question referred to us by the assessee in Anexure "A".

Reference answered accordingly.

[IN THE MADRAS HIGH COURT.]

A. V. K. R. M. KASINATHAN CHETTIAR

v.

COMMISSIONER OF INCOME TAX, MADRAS.

O. P. No. 178 of 1934.

Beasley, C. J., Ramesam, J., and King, J.

December 6, 1934.

FOREIGN BUSINESS—REMITTANCES FROM—ASSESSABILITY—PRESUMPTION—ENTRIES IN ACCOUNT BOOKS—EVIDENTIARY VALUE—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 4 (2).

The assessee carried on a money-lending business at Galle and Colombo in Ceylon with head-quarters at Devakkottah in British India. Between September 9, 1931, and January 4, 1932, he remitted sums amounting in the aggregate to Rs. 16,000 from the business at Galle to Devakottah. The profits of the Galle business from 1928-29 to 1931-32, amounting to Rs. 62,081 were credited to the capital account and the remittance of Rs. 16,000 was debited to a folio in the Galle accounts styled 'Head-quarters current account' which showed a credit balance of Rs. 24,752 in 1921 but had not been subsequently operated upon: Held, *on a reference by the Commissioner, that under the circumstances of the case, the entries in the account books were not conclusive evidence to rebut the presumption that the remittances were made out of the profits of the Galle business and the sum of Rs. 16,000 was therefore assessable to income tax.*

SCOTTISH PROVIDENT INSTITUTION *v.* ALLAN [1903] (1903 A.C. 129; 4 Tax Cas. 590) *referred to.*

Quilon Case: SUBBIAH IYER, S. A. *v.* COMMISSIONER OF INCOME TAX, MADRAS [1930] (I. L. R. 53 Mad. 510; 127 I.C. 131) *distinguished.*

Case stated by the Commissioner of Income Tax, Madras, under Section 66 (3) of the Indian Income Tax Act.

STATEMENT OF CASE

"In accordance with the High Court's order, I have the honour to refer the following case for the decision of the Hon'ble Judges of the High Court under Section 66 (3) of the Indian Income Tax Act, XI of 1922 (hereinafter referred to as the Act).

2. The petitioner is the manager of a Nattukottai Chetty Hindu undivided family carrying on money-lending business at Galle and Colombo in Ceylon with head-quarters at Devakottah within the jurisdiction of the Income Tax Officer, Karaikudi (III) Circle,

3. The reference arises out of the inclusion in the assessment of the petitioner of the year 1932-33 (previous year, Official Year 1931-32) of a sum of Rs. 16,000 as remittance of profit received by him from his business at Galle. The facts relating to this item are as follows:—Between 9th September, 1931, and 4th January, 1932, sums of money aggregating to Rs. 16,000 were remitted by the business at Galle to the petitioner at his head-quarters. The remittances were debited to a folio styled "Head-quarters current account" in the books of the Galle business. This folio had a credit balance of Rs. 61,162 on 27th November, 1919. On 16th March, 1920, a sum of Rs. 40,000 was transferred from this folio to the petitioner's capital account leaving a balance of Rs. 21,162. A sum of Rs. 1,730 was credited as interest on this amount up to 15th April, 1920, and a further interest of Rs. 1,860 was credited as for 15th March, 1921. The balance in this folio on 16th March, 1921 was Rs. 24,752. This so-called current account was not operated upon till September, 1931 (for a period of more than 10 years) and no interest was credited for any year after 15th March, 1921. The remittances in question were debited to this account. The profits of the Galle business for the year 1928-29 to 1931-32, *viz.*, Rs. 62,081 were found credited to the capital account. On these facts the petitioner contended before the Income Tax Officer that the amount that stood to the credit of the head-quarters current account, *viz.*, Rs. 24,752 represented the balance of the moneys sent from head-quarters to the Galle business several years ago, that since the remittances in question had been debited to this folio (and not to the capital account to which the profits of the Galle business from 1928-29 to 1931-32 had been credited) they should be taken to have been made out of this specific sum of Rs. 24,752. This sum was not separated from the other funds of the petitioner employed in the business nor were the remittances in question identifiable with profits of more than 4 years old or with capital. The amount represented by the balance in this account and other moneys belonging to the petitioner including his profits of the year of account and the preceding 3 years were all mixed up together and used for the purpose of his business. The remittances in question came out of such general funds including taxable profits. The Income Tax Officer therefore overruled the petitioner's contention and held that the sum of Rs. 16,000 was assessable. A copy of the Income Tax Officer's order is filed, marked as Exhibit A.

4. The petitioner's appeal to the Assistant Commissioner proved unsuccessful. A copy of the Assistant Commissioner's order is filed, marked Exhibit B.

5. The petitioner then filed an application before me under Section 66 (2) of the Act and required me to state a case and refer a question for the decision of the High Court. I declined to state a case on the ground that no question of law arose. A copy of my order is filed, marked Exhibit C.

The petitioner thereupon moved the High Court under Section 66 (3) of the Act and the High Court by its order dated 23rd April, 1934, directed me to state a case on the following question:—

"Whether the entries in the account books were not evidence for rebutting the presumption that the remittance of Rs. 16,000 to the petitioner in British India between 9th September, 1931, and 4th January, 1932, were made from profits of Galle business and whether the aforesaid sum of Rs. 16,000 was assessable to income tax?"

7. The petitioner contends that the remittances in question were a return of the moneys sent several years ago by its headquarters to the Galle business, and that the entries in the accounts evidence this. The moneys received from head-quarters were apparently used in the business, *i.e.*, in advancing loans to its customers. It is not the petitioner's case that the sum of Rs. 24,752 (the balance in the 'head-quarter current account') had been separately invested, that these investments were realised during the year of account and remitted to British India. The remittances were admittedly made from the general funds of the Galle business which included its profits. The mere debiting of the remittances to the particular ledger folio is not by itself sufficient to show that what was remitted was out of the particular sum sent several years before and credited to that account (*P. L. S. K. R. Firm* v. *Commissioner of Income Tax, Madras; 4 I. T. C. 185*). The question whether the presumption that the remittance was out of taxable profits has been rebutted has therefore to be decided with reference to all the facts taken together. On the facts stated in paragraph 3 above, I am of opinion that the presumption has not been rebutted in this case and that therefore the amount remitted is assessable to income-tax. The question should be answered accordingly.

JUDGMENT.

BEASLEY, C.J.—The question referred to us is: "Whether the entries in the account books were not evidence for rebutting the presumption that the remittances of Rs. 16,000 to the petitioner in British India between 9th September and 4th June, 1922, were made from profits of Galle business and whether the aforesaid sum of Rs. 16,000 was assessable to income-tax." It appears to us that the question referred is not very happily worded because, of course, entries in account books must be some evidence for rebutting the presumption which is raised against an assessee. What is really sought by this question to be decided is whether the Income Tax Officer here was bound to accept as conclusive of the case the entries made in this particular case. The facts of the case are that the assessee who is the manager of a Nattukottai Hindu undivided family carrying on money-lending business at Galle and Colombo in Ceylon with headquarters at Devakottah, between 9th September,

1931, and 4th January, 1932, remitted sums of money aggregating to Rs. 16,000 from the business at Galle to himself at his headquarters at Devakottah and the remittances were debited to a folio styled "Headquarters current account" in the books of the Galle business. This folio had a credit balance of Rs. 62,162 on the 27th November, 1919. On the 16th March, 1920, a sum of Rs. 40,000 was transferred from this folio to the assessee's capital account leaving a balance of Rs. 21,162 in the headquarters current account. To this account there was credited a sum of Rs. 1,730 as interest up to the 15th April, 1920; a further credit of interest of Rs. 1,860 was made on the 15th March, 1931. On the 16th March, 1921, there was in this account a balance amounting to Rs. 24,752. It was out of this account that the remittances in question which the income tax authorities have assessed to income-tax were made. The Commissioner of Income Tax deals with the matter as follows:—

"This so-called current account was not operated upon till September 1931 (for a period of more than ten years) and no interest was credited for any year after 15th March, 1921. The remittances in question were debited to this account. The profits of the Galle business for the years 1928-29 to 1931-32, *viz.*, Rs. 62,081 were found credited to the total account. On these facts the petitioner contended before the Income Tax Officer that the amount that stood to the credit of the headquarters current account, *viz.*, Rs. 24,752 represented the balance of the moneys sent from headquarters to the Galle business several years ago, since the remittances in question had been debited to this folio (and not to the capital account to which the profits of the Galle business from 1928-29 to 1931-32 had been credited) they should be taken to have been made out of this specific sum of Rs. 24,752."

This contention the Commissioner did not accept and we think for good reason. There are two peculiar features to which attention must be drawn with regard to this assessee's business. Usually we think we should say invariably—in banking businesses in addition a capital account being kept there is also a profit account kept. In this case, however, it is peculiar that no such profit account was kept at all and that the profits year after year were carried into the capital account swelling that account year after year and being mixed up with the capital account. That is one peculiar feature. The other peculiar feature is this account, from which the remittances in question are alleged to have been made. This account was in existence in 1919 and at that time represented amounts which had been remitted from headquarters to the Galle business. It is headed the "Headquarters current account" which in view of the later history of it is an entirely misleading description. It was not a current account at all and apparently ceased to be so after the last credit of interest which was on 15th March, 1921. Thereafter, no further interest was credited and the account was not operated upon. It is on account of such a peculiar nature and with

such a strange history that in our view it required that an explanation should be given by the assessee who of course was the person who alone could speak with regard to it. No such explanation was given and in our view, in the absence of such explanation, the account and the entries in it are not acceptable at their face value. This case is somewhat similar though not exactly similar, to *Allen's case* (4 T. C. 590 and 1903 A. C. 129). The difference is that in *Allen's case* the assessee contended that the remittance had been made out of capital and in the present case it is contended that the remittances were made out of a current account but in both cases it was denied that the remittances came out of profits. In our view, having regard to the entire absence of any explanation with regard to this account, it certainly cannot be said that the entries relating to that account must be taken as conclusive of the matter. The facts of this case differ very considerably from the *Quilon case* (53 Mad. 510). The question here was under the circumstances entirely a question of fact and the answer to the question must be that in the circumstances of this case the Income Tax Officer was not bound to accept as conclusive the assessee's entries in his account books. Costs to the Income Tax Commissioner Rs. 250.

[IN THE MADRAS HIGH COURT.]

R. M. A. T. M. MEYYAPPA CHETTIAR

v.

COMMISSIONER OF INCOME TAX, MADRAS.

O. P. No. 21 of 1934.

Beasley, C. J., Ramesam, J., and King, J.

December 10, 1934.

FOREIGN BUSINESS—LOAN TO INDIAN BUSINESS—ASSESSEE BECOMING SOLE OWNER OF BOTH BUSINESSES—EXTINGUISHMENT OF LOAN—ASSESSABILITY OF AMOUNT OF LOAN IN BRITISH INDIA —THEORY OF CONSTRUCTIVE REMITTANCE—INCOME TAX ACT (XI OF 1922), SECTION 4 (2).

The assessee was a partner in a business in Bassein in British India and also in a business in Ipoh in the Federated Malay States. In 1928 the Ipoh business advanced a sum of Rs. 31,200 to the Bassein business as a loan. In 1929-30, the assessee became the sole proprietor of the Bassein business and in 1931-32 he became the sole proprietor of the Ipoh business also. In the old Ipoh accounts the Bassein business was credited with the amount advanced, the amount was transferred to the new Ipoh business, and re-transferred by the new Ipoh business to the new Bassein business. Income tax was levied on this sum of Rs. 31,200 on the ground that there was a constructive remittance of this amount from Ipoh to Bassein : Held, *on a reference by the Commissioner, that the entries in the account books*

were merely made for making adjustments, there was in no sense an actual transfer of any money from Ipoh to Bassein nor was there even a constructive transfer and the sum in question was not therefore assessable to income tax under Section 4 (2) of the Indian Income Tax Act.

Case stated by the Commissioner of Income Tax, Madras, under Section 66 (3) of the Indian Income Tax Act (XI of 1922).

STATEMENT OF CASE.

"In accordance with the High Court's order...I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under Section 66 (3) of the Indian Income Tax Act, XI of 1922 (hereinafter referred to as the Act).

2. The petitioner, RM. AT. M. Meyyappa Chettiar, is the manager of a Hindu undivided family. He carries on money-lending business at Karaikudi, his headquarters, at Ipoh in the Federated Malay States, and at Bassein in Burma. The business at Bassein was a partnership, the RM. AT. M. Firm, Bassein, till the year *Sukla*, 1929-30, when it became the sole business of the petitioner, the other partner owning ¼ share having retired from it in that year. The petitioner was also a partner with 13/16ths share in the RM. AT. M. Firm, Ipoh. The other partner in that firm also retired and the petitioner became the sole owner of this business during the early part of the year of account, 1931-32.

3. The reference arises out of the inclusion in the assessment made upon the petitioner for the year 1932-33 (previous year, Tamil year *Prajothpathi*—13th April 1931 to 12th April 1932) of a sum of Rs. 31,2000 ($20,000) this being held to be a remittance of profit received by him in British India from his business at Ipoh. The facts relating to this item are as follows:—

In the year *Prabava* (1927-28) the RM. AT. M. Firm, Ipoh, remitted Rs. 31,200 to the RM. AT. M. Firm, Bassein, as a loan. The RM. AT. M. Firm, Bassein, became the sole business of the petitioner in *Sukla* (1929-30). In the year *Prajothpathi* (the previous year now in question) the petitioner became the sole owner of the RM. AT. M. concern at Ipoh and he continued the business under the same *vilasam* at Ipoh with most of the assets and liabilities of the firm transferred to the accounts of his sole business started on 12th June, 1931. Among the assets so transferred to the petitioner's sole business was the sum of Rs. 31,200 due by his Bassein business to the defunct RM. AT. M. Firm. This transfer was effected on 20th July, 1931, in the books of the defunct Ipoh firm by crediting the Bassein business and debiting the new sole business of the petitioner at Ipoh and in the books of the latter by crediting the defunct firm's folio and debiting the Bassein branch. The accounts of the defunct RM. AT. M. Firm, Ipoh, were finally

closed on 19th August, 1931. The Income Tax Officer considered that the petitioner having become the sole proprietor of the businesses at Ipoh and Bassein was both the creditor and debtor in repect of this loan, that the loan was therefore extinguished, that the discharge of the Bassein liability was effected by means of funds available at Ipoh which included his share of the profits of the Ipoh firm and that the discharge took place on 20th July, 1931, when the adjustment entries were made in the Ipoh books. The Income Tax Officer therefore treated the sum in question as a constructive remittance of profit received by the petitioner in British India during the year of account.

4. The petitioner appealed to the Assistant Commissioner of Income Tax and contended;

(1) that the change in the constitution of the Ipoh and Bassein businesses did not extinguish the loan due by the latter to the former, that in the books of the Ipoh sole business and the Bassein sole business the transaction continued to be recorded as a loan and that the adjustment entries in the Ipoh and Bassein books were not sufficient to support the theory of constructive remittance;

(2) that even if the sum in question ceased to be a loan it should be deemed to have been remitted to Bassein in the course of current dealings between that business and the Ipoh sole business and that interest was adjusted on this amount by both the businesses; and

(3) that since the agent partner of the Ipoh firm retired from this firm only on 19th August, 1931, he continued to be a partner in the new Ipoh business also till that date and that therefore the entries made in the Ipoh books on 20th July, 1931, amounted only to a transfer of assets from one agency to another.

4. The Assistant Commissioner overruled these objections for the reasons stated in his order, an extract of which is filed marked Exhibit A.

5. The petitioner then filed an application under Section 66 (2) of the Act and required the Commissioner to state a case and refer two questions alleged to be questions of law, for the decision of the High Court. My predecessor declined to state a case on the ground that no question of law arose. An extract of his order is filed marked Exhibit B.

6. The petitioner thereupon moved the High Court under Section 66 (3) of the Act and the High Court has, by its order dated 24th April, 1934, directed me to state a case on the following question:—

Question.—"Whether on the facts and in the circumstances of this case, the sum of $ 20,000 could be held to be constructive remittance of profits in the year of account and assessable as such under Section 4 (2) of the Act.

7. The question is whether on the facts that took place during the year of account, 1931-32, the sum in question could be said to have been received by the petitioner in British India in the year, and if so, whether this was profit that had accrued to him at Ipoh.

At the beginning of the previous year this sum was a debt due by the petitioner to the firm at Ipoh. It was therefore an asset of that firm and was transferred with other assets to the petitioner when he became sole owner of the firm's business in the course of the year. The manner in which this transfer was effected in the accounts is significant, because it actually implies, as part of the process of transfer, a remittance of money to Bassein. I do not wish to confuse the issue by suggesting that there was any actual movement of money. It is common ground that there was not. But the transfer is shown in the books as having taken place in three stages. First, the petitioner's shop at Bassein pays this $ 20,000 to the Ipoh firm—this liability of Bassein to the firm is extinguished by a credit entry. Secondly, the firm makes an advance to the petitioner's new shop at Ipoh which is debited accordingly. And finally, the new shop advances an equivalent sum to the Bassein shop by debiting Bassein and crediting the firm. These are the notional payments recorded in the accounts. The entries clearly support the view that there was a constructive remittance of money belonging to the petitioner from Ipoh to Bassein.

Turning now from the form of transaction to its substance we find that at the beginning of the year the petitioner had $ 20,000 at Bassein which was a debt due to the firm at Ipoh. On his taking over, in the course of the year, the business at Ipoh and with it this debt, he became a debtor to himself; in other words, he ceased to be a debtor at all in respect of this sum, which was still in his possession at Bassein. He still had the money there, but it became his own money, and he was no longer under any obligation to send it back to Ipoh. His debt was discharged by the simple fact of his having stepped into the shoes of the creditor ; and it was discharged by means of a corresponding diminution of the funds at his disposal at Ipoh. This is therefore the familiar case of a person who uses his foreign moneys to discharge a British Indian liability. He has money of his own in British India which was not there before, and which has clearly come from abroad. The facts are sufficient, in my opinion, to prove a constructive remittance of this sum. It will be observed that the remittance took place at the time of his taking over the Ipoh business, and he must be presumed therefore to have drawn on the funds then at his disposal in Ipoh which included assessable profit.

As regards contention (3) urged before the Assistant Commissioner it is sufficient to say that the partner-agent has, by his letter dated 30th August, 1931, disclaimed any interest in the sole business started (with a new agent) on 12th June, 1931.

In my opinion the answer to the question is in the affirmative."

R. Kesava Aiyangar, for the assessee.

M. Patanjali Sastri, for the Commissioner.

JUDGMENT.

BEASLEY, C. J.—The question propounded is: "whether on the facts and in the circumstances of this case, the sum of $ 20,000 could be held constructive remittance of profits in the year of account and assessable as such under Section 4 (2) of the Act."

The year of account is 1931-32; and in that year the assessee was assessed on a total income of Rs. 76,000 odd. The facts of the case are that the assessee was a partner in a business in Bassein and also in a business in Ipoh in the Federated Malay States. In 1928 the Ipoh business in which the assessee was partner advanced a sum in dollars equivalent to Rs. 31,200 to the Bassein business and in the books of both those businesses it was set out as a loan by the Ipoh business to the Bassein business. In 1929-30 the Bassein business ceased to be a partnership and the assessee became its sole proprietor and in that situation the Bassein business, of which he was the sole proprietor, was the debtor to the Ipoh firm in which he was merely a partner. In 1931-32 however, the assessee became the sole proprietor of the Ipoh firm and by this the relationship of debtor and creditor ceased to exist as a man cannot be a debtor to, or creditor of, himself. But certain adjustments had to be made with regard to this previous indebtedness of the Bassein business and, as I understand it, entries were made as follows:—In the account books of the old business in Ipoh there was a crediting of the Bassein business with the amount which was previously lent to the Bassein business. In the books of the new Ipoh business there was a transfer of that Bassein indebtedness as I will call it to the new Ipoh business and then a transfer from the Ipoh business in its account books to Bassein of the identical sum. Thus by means of these book-entries, the sum which had been in Bassein in 1928 got back there again. In fact, of course, it had always remained there; what happend was that by reason of the assessee becoming the sole proprietor of both businesses the character of that money was changed, and instead of being a loan it became the assessee's own money. It seems to me that the entries which appear in the old and new Ipoh business account books and in the Bassein account books were merely for the purpose of making adjustments and that there was in no sense an actual transfer of any money from Ipoh to Bassein nor was there even a constructive one if such a transfer as that can under the Indian Income Tax Act be recognised and as to which some doubts have been expressed. For these reasons in my view, the question propounded should be answered in the negative. Costs to the assessee Rs. 250. The deposit of Rs. 100 made by the assessee for reference will be refunded.

RAMESAM, J.—I agree.

KING, J.—I agree. *Reference answered accordingly.*

[IN THE MADRAS HIGH COURT.]

COMMISSIONER OF INCOME TAX, MADRAS

v.

GOPU BALAKRISHNAYYA AND OTHERS.

Beasley, C. J., Ramesam and Sundaram Chetty, JJ.

April 30, 1934.

FIRM—DISCONTINUANCE OF BUSINESS—NO EVIDENCE OF DISSOLUTION—ASSESSMENT AS UNREGISTERED FIRM—LEGALITY—REFUSAL OF APPLICATION FOR REGISTRATION AS FIRM—EFFECT—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 2 (14), 22 AND 26-A.

A firm ceased to do business in November 1931, but the resolutions passed by the firm and other evidence showed that the partnership had not been dissolved. When a notice was issued on the firm on 2nd April, 1932, in respect of the income for the year 1930-31, the assessees filed an application for registration of the firm producing a partnership deed dated 21st April, 1932, but registration was refused and the firm was assessed as an unregistered firm. The question 'whether on the facts of the case there was a firm in existence against which proceedings for assessment could be taken under Sections 22 and 23' was referred to the High Court: Held, *that there was sufficient evidence to support the Commissioner's finding that the firm was in existence though it had discontinued its business, and proceedings could be taken against it under Sections 22 and 23 of the Income Tax Act.*

Case stated by the Commissioner of Income Tax, Madras, under Section 66 (2) of the Indian Income Tax Act (XI of 1922). [O. P. No. 22 of 1933].

STATEMENT OF CASE.

"I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under Section 66 (2) of the Indian Income Tax Act, XI of 1922 (hereinafter referred to as the Act).

2. The petitioners, Gopu Balakrishnayya and Batchu Krishnayya, are the managing partners of an unregistered firm consisting of 17 persons formed on 17th November, 1929, for the purpose of carrying on an oil mill business at Bezwada, within the jurisdiction of the Income Tax Officer, Bezwada. In pursuance of their object they took lease of the buildings and machinery of the Kanaka Durga Oil Mill for a period of 2 years from 17th November, 1929 and carried on the business of manufacturing and selling groundnut oil under the name and style "Sri Gopalakrishna Oil Mill". The petitioners worked the mill till the expiry of the lease on 16th November, 1931, when it was handed over to the lessor.

3. For the assessment of the year 1931-32, (based on the income of the previous year 17th November, 1929, to 16th November, 1930) the petitioners filed, on 1st December, 1931, a return of income showing a net loss of Rs. 7,854. Along with the return of income, one of the managing partners of the firm made a written request to the Income Tax Officer that as the firm had been dissolved on 28th November, 1931, it would facilitate matters if its assessment for the year 1932-33 (previous year 17th November, 1930, to 16th November, 1931) were made under Section 25 (1) of the Act, simultaneously with the assessment for the year 1931-32. The Income Tax Officer decided on 5th January, 1932, to make no assessment for 1931-32 ; and as regards the assessment for 1932-33 he issued on this date a notice under Sections 22 (2) and 25 (1) of the Act. The petitioners filed the return on the same date. After the examination of the accounts produced for this year the Income Tax Officer dropped the further proceedings under Section 25 (1) on 11th February, 1932, as he saw no necessity to assess the firm under the special provisions of this section.

4. The Income Tax Officer issued in the usual course on 2nd April, 1932, a notice under Section 22 (2) of the Act to the petitioner firm for the assessment of the year 1932-33 (previous year 17th November, 1930, to 16th November, 1931), the assessment now in question; and this was served on 19th April, 1932. On 4th May, 1932, the petitioner firm filed with the Income Tax Officer a copy of certain resolutions passed at a meeting of its members held on 20th April, 1932. A translation of this is filed, marked Exhibit A. On 7th May, 1932, the petitioners filed the return of income on behalf of the firm for the year 1932-33. Along with the return they filed also an application for registration of the firm under Section 26-A of the Act, on the basis of an alleged instrument of partnership entered into between the 17 persons (the partners of the firm) on 21st April, 1932, in pursuance of resolution No. 7 referred to in Exhibit A. A translation of this deed is filed, marked Exhibit B. The Income Tax Officer refused to accept the partnership deed for the purpose of the registration of the firm on the following grounds :—

(*a*) that the business to conduct which the partnership was formed had come to an end in November 1931, and

(*b*) that there was really no evidence of any new business having been started after that date.

The Income Tax Officer therefore refused to register the firm. The petitioners then applied to me under Section 33 of the Act against the Income Tax Officer's refusal to register the firm. I declined to interfere with the decision of the Income Tax Officer. The Income Tax Officer thereupon completed the assessment on 30th July, 1932, treating the petitioners as an unregistered firm.

5. The petitioners appealed to the Assistant Commissioner and contended;

(*a*) that since the partnership had been dissolved and its business discontinued in November, 1931, it would not be assessed as a firm though the profits earned by it would be assessable in the hands of the individual partners according to their respective shares;

(*b*) that registration having been refused on the ground that there was no partnership in existence no notice under Section 22 (2) could have been issued and no assessment could have been made on the firm as such; and

(*c*) that in the absence of an express provision in the Act analogous to Section 25-A (2), governing the case of the divided members of a Hindu family, the assessment made on the firm was illegal and without jurisdiction.

The Assistant Commissioner overruled the contentions for the reasons stated in his order, a copy of which is filed, marked Exhibit C.

6. The petitioner now requires me to refer to the High Court two questions arising out of the Assistant Commissioner's order. I have reframed these questions as follows, and refer them accordingly:

(1) Whether on the facts of this case there was a firm in existence against which proceedings for assessment could be taken under Sections 22 and 23;

(2) If not, whether Section 44 enables an assessment to be made in the name of the firm.

7. *Question (1)*:—Though this question is primarily a question of fact I refer it for the decision of the Court since legal considerations are involved. The petitioners' contention in respect of this question is that the firm necessarily ceased to exist with the cessation of its business on 16th November 1931. (Section 42 (*b*) of the Indian Partnership Act of 1932 is referred to in this connection, but that Act was not in force at the period with which this reference is concerned). But the evidence in Exhibit, A, *viz.*, resolutions 2, 5 and 7 passed at the meeting held on 20th April, 1932, and the evidence of Exhibit B, *viz.*, the so-called deed of partnership dated 21st April, 1932, are contrary to this contention. According to those documents even though the active business of the firm had been discontinued the firm was to continue its existence for the collection of the outstandings still left and for the payment of the liabilities still unpaid, one such liability being income tax. This is in accordance with Section 263 of the Indian Contract Act (IX of 1872), under which the rights and obligations of the partners after dissolution of the partnership, continue in all things necessary for winding-up the business of the partnership. The settlement of the firm's income tax liability was an important element in winding-up, as the petitioners themselves evidently realised. I am therefore of opinion that the petitioner firm

continued to exist notwithstanding the cessation of its business in November, 1931. The reason for refusing registration was not that the firm had ceased to exist, but that it was not one "constituted under an instrument of partnership."

8. *Question* (2) :—If there was no firm in existence on 19th April, 1932, the date on which the notice under Section 22 (2) was served, the question arises whether that notice, issued in the name of the firm, was validly served, and whether an assessment could be legally made thereafter in the name of the firm. It appears to me that Section 44 of the Act was intended to meet such a case, and that it imposes a liability on partners of a defunct firm to submit to an assessment made in the name of the firm. It will be noted that this section forms part of Chapter V which is headed "Liability in special cases." The argument on behalf of the petitioners is that this section merely provides for recovery from the ex-partners, of tax imposed on the firm before its dissolution. But if this were so the provision would naturally occur in Chapter VI (headed "Recovery of Tax and Penalties") not in Chapter V; and moreover, this section regarded as mere machinery for collection, is otiose, for when an assessment has been made on the firm the tax demanded is a debt due by the firm, and the partners after dissolution are under the general law (Contract Act, Section 249) jointly and severally liable for all such debts. It appears to me therefore that this section, like the other sections in the same chapter of the Act, creates a liability to *assessment*. The profits to be assessed, according to the section, are those of the firm, and the tax due on such assessment may be recovered from any or all of the ex-partners."

M. Patanjali Sastri, for the Commissioner of Income Tax.

M. Subbaraya Ayyar, for the assessee.

JUDGMENT.

BEASLEY, C. J.—Two questions have been referred to us. I will deal with the first of them only, *viz.*, "Whether on the facts of this case there was a firm in existence against which proceedings for assessment could be taken under Sections 22 and 23."

The Income Tax Commissioner in dealing with that question says that that is primarily a question of a fact. With that I entirely agree. He continues that some legal considerations are involved. I do not know where they are. The facts of the case, so far as the reference before us is concerned, are that this firm ceased to do active business in November 1931, but there is ample evidence which is contained in a partnership deed (Exhibit B) which was produced and also in the resolutions passed by the company on the 20th April 1932 (Exhibit A) showing that the partners were meeting together and passing resolutions and describing the company as a going concern. Having thus

described themselves in resolutions, they did so, as before mentioned, in a partnership deed which is dated the 21st April, 1932. This partnership deed it has been found was got up for the purpose of supporting an application made by the assessees for registration. That application was rejected and in revision the Income Tax Commissioner refused to interfere with the Income Tax Officer's order refusing to register the partnership. The only difficulty which has arisen in this case has been due to the fact that apparently the Income Tax Officer in addition to describing the partnership deed as a bogus one said that there was no partnership in existence. It was not necessary to come to that conclusion at all in order to support his order of refusal to register since it is only firms constituted under an instrument of partnership that are entitled to registration. This clearly was not a firm constituted under an instrument of partnership. The firm had gone on under an oral arrangement and upon that ground the Income tax Officer was entitled to reject the application for registration. The Income Tax Commissioner finds that there was a firm in existence; and we are therefore here dealing with an unregistered firm which upon evidence—and it is certainly evidence of some importance—the Income Tax Commissioner has found to be in existence. The resolutions passed by the firm itself cannot possibly be ignored. Resolution (2) substitutes the sentence "the active business of the Sri Gopalakrishna Oil Mill Company has been discontinued" for the sentence already in existence, namely, "The Sri Gopalakrishna Oil Mill Company has been dissolved." Therefore, by that resolution it is shown that although the business had been discontinued the partnership had not been dissolved. By resolution No. 5 every member is to take notice of the fact that the firm is still a going concern. That is how it is described in the deed of partnership. Another resolution is resolution No. 7 which afforded ample evidence to the Income Tax Commissioner upon which to hold that there was a partnership which was running. Under these circumstances, the answer to the first question must be in the affirmative. That being so, it is not necessary to answer the second question.

The Income Tax Commissioner will get costs Rs. 250.

RAMESAM, J.—I agree.

SUNDARAM CHETTY, J.—I agree.

Reference answered accordingly.

[IN THE LAHORE HIGH COURT.]

BELI RAM & BROTHERS

v.

COMMISSIONER OF INCOME TAX, PUNJAB & N. W. F. P.

Miscellaneous Civil No. 608 of 1934.

Addison, J., and Din Muhammad, J.

January 2, 1935.

HINDU UNDIVIDED FAMILY—ALLEGATION OF PARTITION AND FORMATION OF NEW FIRM—PROCEDURE—ASSESSEE'S RIGHT TO DECISION OF THE QUESTION WHETHER NEW FIRM WAS CONSTITUTED—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 25-A, 26, 26-A AND 66 (2).

Though Section 25-A deals with assessment after partition of an undivided family, it does not exclude the possibility of the members so separated constituting themselves into a firm so as to bring their case within Section 26.

A business was owned by a Hindu family consisting of A and his sons, B. C. & D. In the year of assessment, in filing the return of the business the assessees claimed that a partition had taken place in the family, that A had separated himself, that B, C, & D, had constituted themselves into a new firm and that assessment should therefore be made on that basis. At the same time an application was also made for registration of the new firm under Section 26-A. The Income Tax Officer held that though a separation had taken place, the family remained joint throughout the year and the case therefore fell under Section 25-A and not under Section 26 and refused to register the new firm. On appeal the Assistant Commissioner refused to interfere on the ground that it would involve an interference with the finding of the Income Tax Officer under Section 26-A, against which no appeal lay, and the Commissioner refused to state the case on the ground that there was no question of law: On an application under Section 66 (3), the High Court held, that the assessee was entitled to an adjudication of the question whether a new firm had been constituted so as to attract the operation of Section 26 and he could not be deprived of this legal right merely because an adjudication on this question would affect the decision of the Income Tax Officer under Section 26-A, and the Commissioner was directed to refer whether the question the Assistant Commissioner was justified in refusing to decide whether Section 25-A or 26 was applicable to the case.

Application under Section 66 (3) of the Indian Income Tax Act, praying that the Commissioner Income Tax, Punjab, be directed to state the case and refer it to the High Court.

Kirpa Ram Bajaj, for the assessees.

J. N. Aggarwal and *J. L. Kapur*, for the Commissioner of Income Tax.

ORDER.

This is an application under Section 66 (3), Indian Income Tax Act, XI of 1922. It has arisen out of the refusal of the Commissioner to draw up a statement of the case and refer it with his own opinion thereon to this Court.

The assessee carries on business at Lahore under the style of Beli Ram and Brothers. Prior to the year under assessment this business was owned by a Hindu undivided family consisting of Bishen Das and his three adult sons, namely, Beli Ram, Kirpa Ram and Balak Ram. When the present return was furnished to the Income Tax Officer it was claimed that a partition had taken place among the members of this family, that Bishen Das had separated entirely from the business receiving the whole immovable property owned by the family as his share, that the remaining three members had constituted themselves into a new firm and that the assessment therefore should henceforth be made on that basis. In support of these allegations reliance was placed on an award dated the 31st March, 1932, and a deed of partnership dated the 14th June, 1932. At the same time an application was made to the Income Tax Officer for registration of the firm for the purposes of the Income Tax Act under Section 26-A. The Income Tax Officer by his order dated the 15th February, 1933, refused to register the firm and came to the conclusion that despite the fact that a separation of the members of the family had taken place, the family remained joint throughout the year and the case fell under Section 25-A and not under Section 26. The assessee appealed to the Assistant Commissioner under Section 30 (1) of the Income Tax Act and contended, *inter alia*, that inasmuch as the Income Tax Officer had found that disruption had taken place on the 31st March, 1932, and also because a new firm had been constituted as evidenced by the partnership deed of the 14th June, 1932, the Income Tax Officer should have dealt with the case under Section 26 and not under Section 25-A. The Assistant Commissioner refused to adjudicate on this question on the ground that the decision depended on the determination of the question whether a new firm had been constituted or not and this involved an interference with the findings of the Income Tax Officer under Secton 26-A against which no appeal lay.* The assessee then moved the Commissioner against this decision under Sections 33 and 66 (2) and urged, among other things, that the Assistant Commissioner had erred in law in holding that he was debarred from deciding the question as to the applicability of Section 25-A or Section 26. The Commissioner, however, affirmed the order of the Assistant Commissioner. He held that the Assistant Commissioner was "perfectly correct in refusing to adjudicate on a question about which the law provided no appeal" and declined to refer the question to this Court on the ground that no question of law arose out

*[The Act as amended in 1933 provides for appeal from orders made under Section 26-A.—Ed.]

of the order of the Assistant Commissioner under Section 31. It is against this order that the present application has been made.

We have heard Mr. Kirpa Ram Bajaj on behalf of the assessee and Mr. Jagan Nath Aggarwal on behalf of the Commissioner and have come to the conclusion that the Commissioner's decision is incorrect and that the present application should succeed. In our opinion the assessee was entitled to an adjudication of the question whether a new firm had been constituted so as to attract the operation of Section 26 and he could not be deprived of this legal right merely on the ground that an adjudication on this question would tend to affect the decision of the Income Tax Officer under Section 26-A against which no appeal was competent. Section 25-A no doubt deals with an assessment after partition of an undivided family, but it does not exclude the possibility of the members so separated to constitute themselves into a firm so as to bring their case within the ambit of Section 26. Out of the order passed under Section 31, Income Tax Act, by the Assistant Commissioner, a question of law did arise, therefore, as to whether his refusal to determine which of the two Sections 25-A or 26 was applicable to the facts of the case was justified and the Commissioner should have referred this question to this Court.

We accordingly accept the petition and require the Commissioner to state the case and refer it to this Court. We, however, wish to make it clear that this is the only question that arises out of the order under Section 31. In the peculiar circumstances of the case we make no order as to costs.

Order accordingly.

[IN THE CALCUTTA HIGH COURT.]

THE CALCUTTA STOCK EXCHANGE ASSOCIATION, LTD., *In re.*

Reference No. 16 of 1934.

Lort-Williams and Jack, JJ.

December 5, 1934.

PROPERTY—ASCERTAINMENT OF ANNUAL VALUE—'PROPERTY IN THE OCCUPATION OF THE OWNER FOR HIS OWN RESIDENCE,' MEANING OF—WHETHER APPLIES TO COMPANIES—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 9 (2) PROVISO.

The word 'residence' in the proviso to sub-Section (2) of Section 9 of the Indian Income Tax Act is used in its simple and ordinary meaning signifying the place where a human being eats, drinks and sleeps or where his family or his servants eat, drink and sleep, and the expression 'where property is in the occupation of the owner for his own residence' in the said proviso is intended to apply only

to dwelling houses of human beings. It is not applicable to fictional persons such as limited companies.

Where a Stock Exchange Association which did not carry on any business owned a building which was partly used as a meeting place of the Stock Exchange and partly let out to the members of the association for their business as members of the Stock Exchange: Held *that the building could not be said to be in the occupation of the Association wholly or in part for its own residence within the meaning of the proviso to Section 9 (2) of the Indian Income Tax Act.*

Cases referred to:

CALCUTTA JUTE MILLS *v.* NICHOLSON and CASENA SULPHUR CO. *v.* NICHOLSON [1876] (1 Tax Cas. 83; L.R. 1 Ex. D. 428).

DE BEERS CONSOLIDATED MINES LTD. *v.* HOWE [1906] (1906 A.C. 465).

KING *v.* INHABITANTS OF NORTH CURRY [1825] (4 Barn. and Cress. 953).

Reference made by the Commissioner of Income Tax, Bengal, under Section 66 (2) of the Indian Income Tax Act.

STATEMENT OF CASE.

"At the instance of the Calcutta Stock Exchange Association, Ltd. (hereinafter referred to as "the Assessee") I have the honour to refer for the decision of their Lordships under Section 66 (2) of the Income Tax Act (XI of 1922) the question of law which I set out later in the course of this statement of case.

2. The Assessee is a mutual benefit limited liability company the main object of which is, as stated in the application under Section 66 (2), to support and protect the character, status and interests of brokers and dealers in stocks and shares in the Stock Exchange, to give facilities to its members to carry on business, to make rules and bye-laws to regulate business, to settle disputes amongst the members and to maintain a Stock Exchange.

3. The company owns a four storeyed building situated at 7, Lyons Range, Calcutta, on the ground-floor of which there is a large hall used as the meeting place of the Stock Exchange, two tiffin rooms, a telephone room and a quotation room. On the mezzanine floor are situated the offices and meeting place of the Association, while the 1st, 2nd and 3rd floors are occupied by the members.

4. In the assessment for the year 1933-34 on the year of account ending 30th June, 1932, the Income Tax Officer computed a total income of Rs. 59,798 made up as follows:—

		Rs.
Income from other sources (Section 12)	...	3,611
Income from house property (Section 9)	...	24,117
Interest on securities (Section 8)	...	32,070

This income from house property is the *bona fide* annual value of the building owned by the assessee described above and has been taxed under Section 9 of the Act.

5. The assessee objected to assessment in respect of the notional income from the ownership of this property under Section 9 and filed an appeal before the Assistant Commissioner in which the following were the only grounds advanced :—

(1) The property in question should not have been assessed to income tax at all.

(2) Even if the property be liable to income-tax the deductions allowable under Section 9 of the Act should have been allowed, *viz.*, ground rent, insurance, statutory repairing charges, collection charges and other incidental charges.

In the course of the argument before the Assistant Commissioner in appeal the further ground was taken that, as this house property is in the occupation of the company including its members, the appellant was entitled to the benefit of the proviso to Section 9 (2).

6. All the contentions as advanced were decided against the assessee. That there was no taxable income from this property is clearly contrary to the decision of the Lahore High Court in the case of *The United Service Club, Simla* v. *The Crown* (I. L. R. 2 Lah. 109), a decision which, so far as I am aware, has not been challenged in any other Court. The second contention is not in keeping with the actual facts, for the expenses claimed before the Assistant Commissioner were, in fact, allowed by the Income tax Officer, as the assessee's representative admitted before the Assistant Commissioner at the time of the hearing of the appeal. We are left, therefore, with the third contention which is that the assessee is entitled to the benefit of the proviso to Section 9 (2) of the Act.

7. I should perhaps state at this stage that the assessee has formulated a number of independent or alternative questions in his application under Section 66 (2) and these I have set out as Annexure (1) to this statement of case, but as those questions in my view, do not arise out of the appellate order or the grounds of appeal, the only question which I am prepared to state is the one which I hereby formulate :—

"In the circumstances set out above can the property in question or any portion thereof be said to be in the occupation of the owner for the purpose of his own residence within the meaning of Section 9, sub-section (2), proviso, of the Indian Income Tax Act (XI of 1922).

Section 9 (2) and proviso of the Act run as follows :—

"For the purpose of this section, the expression 'annual value' shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year.

Provided that, where the property is in the occupation of the owner for the purposes of his own residence, such sum shall, for the purposes of this section, be deemed not to exceed ten per cent. of the total income of the owner".

8. I admit that a company is a person and must be deemed for certain purposes of the Act, *e.g.*, Section 4 and Section 42, to have a place of residence and that for certain purposes, the place of residence of the assessee in this case is this very building. But the word "residence" as used in Section 9, sub-Section (2), proviso, does not, in my opinion, refer to any such legal fiction and the expression "property in the occupation of the owner for the purpose of his own residence" in my view, means and connotes an owner's dwelling house. This is a reasonable inference from the phraseology in Section 10 (2) (1) of the Act where we find the term "dwelling house" is used to connote the same category of property. The assessee being registered as a company has a legal personality and can hold property, and secondly, being a property-holder can be assessed to pay income-tax on that property. It cannot, however, occupy for the purpose of its own residence within the meaning of the proviso to sub-Section (2) of Section 9. The word "own" qualifying "residence," in my view, makes it clear that something more than a mere legal fiction is here contemplated and "residence" here must mean and import the actual physical act of dwelling and, in my view, a company is not capable of any such act. Occupation by its members would not, in my opinion, satisfy the requirements of the proviso. A company is a separate entity distinct from its members and occupation by the members even if such occupation be for the purpose of their residence, will not be occupation by the company for the purpose of its residence and even if the members occupy in order thereby to facilitate the discharge of the function of the company, though this may be occupation of the company, it will be occupation for a purpose other than the company's own residence.

The rooms on the first, second and third floors of the building in question are let out to members of the Association on a monthly rent over and above the usual membership fee. The period of lease was at one time 5 years but has now been reduced to 3. The members are allowed to use the rooms allotted to them in the building for the purpose of doing Stock Exchange business and for no other purpose.

9. I do not know the reason for the insertion of this proviso which has been taken over from the Income Tax Act of 1918.

Perhaps it is for the purpose of preventing undue hardship to persons who by accident of circumstance, *e.g.*, inheritance, have acquired a residential property, the value of which is out of proportion to their total income.

10. I may perhaps note in passing that the assessee-company has not been taxed on any income under the head "business" and does not carry on any business within the meaning of the Act and consequently the general exemption from tax, under this section, of property occupied for business purpose does not apply.

11. In my opinion, therefore, the proviso to Section 9 (2) of the Act has no applicability in this case, but even if your Lordships take a different view of the meaning of the expression "own residence" that part of the property occupied by the members cannot, in my opinion, fall within the proviso for reasons set out above.

12. I append to this statement of case a copy of (1) the Assessment order (Mark A); (2) the Grounds of appeal (Mark B): (3) the Appellate order (Mark C); (4) the Application under Section 66 (2) of the Act (Mark D).

13. It is requested that a copy of Your Lordships' decision in the matter be forwarded to me in due course."

S. N. Banerjee and *Khaitan*, for the assessees.

The Advocate-General and *Dr. Radha Binode Pal*, for the Commissioner of Income Tax.

JUDGMENT.

LORT-WILLIAMS, J.—This is a case stated by the Commissioner of Income Tax at the instance of the Calcutta Stock Exchange Association, Limited, under Section 66 (2) of the Income Tax Act (XI of 1922).

The Assessees are a mutual benefit liability company, their main objects being to support and protect the character, status and interest of brokers and dealers in stocks and shares on the Stock Exchange, to give facilities to its members to carry on business, to make rules and bye-laws to regulate business, to settle disputes amongst themselves and to maintain a Stock Exchange.

The Company owns a four storeyed building at 7, Lyons Range, Calcutta, on the ground floor of which there is a large hall used as the meeting place of the Stock Exchange, two tiffin rooms, a telephone room and a quotation room. On the mezzanine floor are situated the offices and meeting place of the association, while the first, second and third floors are occupied by members. The rooms on these floors are let out by the company to the members of the Stock Exchange. They are not used by them for the purpose of residence.

The company owns, in addition to this building certain securities, and derives an income from other sources, such as the publication of the Stock Exchange quotation lists which are sold both to members and to non-members of the Association.

In the assessment for 1933-34, the Income Tax Officer computed the total income at Rs. 59,798, which included a sum of Rs. 24,117 in respect of income from the house property at 7, Lyons Range. That sum is the *bona fide* annual value of the building and was taxed under Section 9 of the Act.

The assessees objected to the assessment on various grounds. The only one which we need consider is their contention that they are entitled to the benefit of the proviso to Section 9, sub-Section (2).

The assessees were not taxed on any income under the head "business" because they contended, and their contention was accepted, that they did not carry on any business within the meaning of the Act.

The question formulated by the Commissioner is as follows :—

"In the circumstances set out above, can the property in question or any portion thereof be said to be in the occupation of the owner for the purpose of his own residence within the meaning of proviso to Section 9, sub-Section (2) of the Indian Income Tax Act (XI of 1922)?"

The Commissioner decided that the answer to that question must be in the negative, and the assessees having complained about that decision, he agreed to state a case for the opinion of this court. The Commissioner's contention was, that though a company is a "person" and must be deemed for certain purposes of the Income Tax Act, *e.g.*, Section 4 and Section 42 to have a "place of residence" and that though for certain purposes, the "place of residence" of the assessees in this case is the building at 7, Lyons Range, yet the word "residence", as used in proviso to Section 9, sub-Section (2) does not refer to such a "person" or such "residence" and the expression "property in the occupation of the owner for the purpose of his own residence" means and connotes an owner's dwelling house.

In my opinion, the word "residence" in its simple and ordinary meaning signifies the place where a human being eats, drinks and sleeps or where his family and servants eat, drink and sleep, and where there is some permanence or continuance of such eating, drinking and sleeping, and the statement of BAYLEY, J. in the case of *The King* v. *The Inhabitants of North Curry* is, in my opinion, an authority for that proposition. In that case, the learned Judge said that "where there is nothing to show that it is used in a more extensive sense, the word "residence" denotes the place where an individual eats, drinks and sleeps, or where his family or his servants eat, drink andsleep". It is true that in

certain circumstances and in certain statutes, a more extended meaning has been given to the word; for example, it has been held that a limited liability company can "reside" for the purpose of income tax legislation. That was decided by LORD LOREBURN in the case of *De Beers Consolidated Mines, Ltd* v. *Howe*, wherein it is stated that "A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. The decisions of CHIEF BARON KELLY and BARON HUDDLESTON in *The Calcutta Jute Mills* v. *Nicholson* and *Cesena Sulphur Company* v. *Nicholson*, now 30 years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on." Moreover, it has been decided, that a company is a person who can reside within the meaning of the word "reside" as used in the Income Tax Act and other statutes. But, in my opinion, a Company can only "reside" within that extended meaning of the term, when it resides for the purpose of carrying on business and it cannot reside apart from carrying on business. Thus in both Sections 4 and 42 of the Indian Income Tax Act, it is clear that the word "reside" is only used in connection with the carrying on of a business and not otherwise.

Now, it is true that the assessee comes within the terms of the proviso to Section 9 (2) if the extended meaning of the word "residence" to which I have referred is given to that word in this particular section. In my opinion, there is no justification for giving to the word in this particular section that extended meaning, nor do I think the legislature intended that such an extended meaning should be given to it.

In this connection, it is to be noticed that the word "own" has been inserted between the words "his" and "residence." I think that the object of inserting that word was to indicate that the phrase applied only to a human person or persons and not to a fictional person, such as a limited liability company. Little help can be derived from other decisions either in England or in India on other sections of the Income Tax Act, because this seems to be a peculiar section, the reason for the insertion of which is not apparent. One can imagine various reasons and some of them are indicated in SUNDARAM's book on the "Law of Income Tax," at p. 494 in his note upon this proviso.

The result is that the answer which we give to the question which has been stated by the Commissioner is in the negative.

Costs of the Advocates appearing in this Reference will be settled by the Taxing Master.

Solicitors.—Messrs. Khaitan and Co., for the assessees; *Dr. R. B. Pal*, for the Commissioner of Income Tax.

[IN THE LAHORE HIGH COURT.]

JAMNA DHAR POTDAR AND CO., LYALLPUR

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Civil Mis. No. 655 of 1933.

Addison and Sale, JJ.

June 26, 1934.

RETURN—NOTICE NOT GIVING THIRTY DAYS FOR FILING RETURN—VALIDITY—EFFECT OF SUBSEQUENT EXTENSION OF TIME—REFERENCE—QUESTION NOT RAISED IN APPEAL CANNOT BE REFERRED—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 22 (2), AND 66 (2).

Under Section 22 (2) of the Indian Income Tax Act thirty clear days must be given for the furnishing of the return from the date of service and if this minimum period of time is not given the notice will be illegal and a subsequent extension of time will not cure the defect.

If a question is not raised in the appeal before the Assistant Commissioner of Income Tax, it cannot be said to arise out of an order made by him under Section 31 and the assessee has no right to require the Commissioner to refer the question.

Case referred to:

KAJORI MAL KALYAN MAL, *In re* [1930] (122 I.C. 741; A.I.R 1930 All. 209; 1930 A.L.J. 78.)

Application under Section 66 (3) of the Income Tax Act to direct the Commissioner to state the case and refer certain questions to the High Court.

Shiv Dutt Jhingan, Shamair Chand and *Qabul Chand* for the assessees.

J. N. Aggarwal, for the Commissioner of Income Tax.

ORDER.—An application was made under Section 66 (2) of the Income Tax Act asking the Commissioner of Income Tax to state a case on certain points, alleged to be questions of law arising out of the assessment of the petitioner, Jamna Dhar Potdar and Co., Lyallpur. Two of these questions which were asked to be referred were: (*a*) Was not the notice under Section 22 (2) served on 31st August, 1931, demanding the return of income on or before 26th September, 1931, *ab initio* illegal as not giving the statutory thirty days' time required under Section 22 (2) of the Income Tax Act? and (*b*) Was not the Income Tax Officer bound to decide the preliminary question as to the legality of the constitution of the firm

under Section 239 of the Contract Act, before proceeding to make an assessment? It is not necessary to set out the other questions as it was not contended before us that they should be referred. The Commissioner refused to state a case and to refer the questions for the decision of the Court and the petitioner has applied for a mandamus.

As regards the first question it seems to us that a question of law is involved. It was not disputed before us that the notice under Section 22 (2) was not served till 31st August, 1931, or that it only gave time up to 26th September, 1931, for the putting in of the return. Apparently this notice is illegal as it would seem that under Section 22 (2) of the Act, thirty clear days must be given for the furnishing of the return from the date of service. It was held in *Kajori Mal Kalyan Mal, In re*, that under Section 22 (2) the Income Tax Officer must give the proposed assessee at least thirty days' time within which to furnish his return. If this minimum is denied the notice becomes entirely illegal and no subsequent extension of time will cure the defect that initially lay till the notice issued.

As regards the second question it may also be the case that a question of law is involved, but this question was not raised in the appeal to the Assistant Commissioner and, therefore does not arise out of the order under Section 31. The petitioner therefore had no right to demand that the Commissioner of Income Tax should refer this question. This apparently will not be important if he finally succeeds on the question arising as to the legality of the notice; for, if a fresh notice has to issue, it would seem that it will be open to the assessee to agitate this matter again. For the reasons given we direct the Commissioner of Income Tax to state a case as to the legality of the notice served on the assessee on 31st August, 1931, under Section 22 (2) of the Act and to refer it for decision to this Court. We make no order as to costs as many other questions were raised which, however, have not been pressed before us.

Order accordingly.

[IN THE CALCUTTA HIGH COURT.]

SADHUCHARAN ROY CHOWDHRY & OTHERS, *In re.*

Lort-Williams and Jack, JJ.

January 24, 1935.

INCOME TAX—DEPRECIATION ALLOWANCE—LEASE OF JUTE PRESS—LESSOR'S RIGHT TO ALLOWANCE FOR DEPRECIATION—LEASING, WHETHER 'BUSINESS'—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 10 (2) (vi) and 12.

The assessee who owned a jute press leased it out to a private company. Under the terms of the lease the lesseee agreed to pay a certain rent to the assessee and also to carry out all repairs to the machinery and buildings. The assessee was assessed under Section 12 in respect of the income from this source and his claim to an allowance for depreciation in respect of the buildings, plant and machinery leased out was disallowed by the Commissioner on the ground that the assessee was not carrying on any business and so Section 10 (2) (vi) had no application: Held, *on a reference by the Commissioner, that the letting of the jute press at a rent was a business and the assessee was entitled to the allowance claimed by him under Section 10 (2) (vi) of the Indian Income Tax Act.*

Mangalagiri Sri Umamaheswara Gin and Rice Factory v. *Commissioner of Income Tax, Madras* [1926] (2 I. T. C. 251; 51 M. L. J. 360; 97 I. C. 850; 24 L. W. 680; A. I. R. 1926 Mad. 1032) *followed.*

Cases referred to:

ATTORNEY-GENERAL *v.* BORRODAILLE [1814] (1 Price's Ex. Rep. 163.)

COMMERCIAL PROPERTIES, LTD., *In re* [1928] (55 Cal. 1057; 113 I. C. 848; 32 C. W. N. 431; 3 I. T. C. 23.)

DODDINGTON *v.* HALLET [1750] (1 Ves. Senior 497.)

KALADAN SURATEE BAZAAR CO., LTD., *In re* [1920] (1 I. T. C. 50; 56 I. C. 914.)

SUTHERLAND *v.* COMMISSIONERS OF INLAND REVENUE [1926] (12 Tax Cas. 63.)

Reference made by the Commissioner of Income Tax, Bengal, under Section 66 (2) of the Indian Income Tax Act (XI of 1922).

STATEMENT OF CASE.

" At the request of Sadhu Charan Roy Chowdhury and others (hereinafter referred to as the assessee) I have the honour to refer to the Hon'ble High Court under Section 66 (2) of the Indian Income Tax Act (XI of 1922) a question of law hereinafter stated

arising out of the assessment on the above assessee to income tax for the year 1932-33.

2. The facts of the case are as follows: The assessee purchased the Sulkea Jute Press in 1907 from Messrs. M. Nahapiet and Company and worked that Jute Press himself until the year 1929 or 1930. With effect, however, from the first of August, 1931, he leased out the press for a term of one year to the Sulkea Jute Pressing Company, Limited, a private company in which he holds more than 60 per cent. of the shares and that lease is still subsisting there being no renewal but the lessee holding over under the original terms of lease. These are embodied in a letter dated 31st July 1931, from the assessee lessor to the lessee, a copy of which is appended to this statement of case and marked Annexure 1, and for facility of reference, I note below conditions (*a*), (*b*) and (*c*) of that lease as noted in that letter as they have a considerable bearing on the question at issue :—

(*a*) You shall pay us a nett annual rent of Rs. 22,500 only payable as follows, *i.e.*, Rs. 2,500 to be paid by the 31st day of August 1931 and the balance by four instalments of Rs. 5,000 each on the 1st November 1931, 1st February, 1st May and 1st August 1932.

(*b*) During the said period of one year, we shall only pay the rents payable to the superior landlords and you shall pay the municipal taxes, Fire Brigade license and all other outgoings and public charges.

(*c*) You shall carry out all repairs to the engines, machineries and plant, godowns and buildings during the said period at your own expenses.

The assessee returned no income from this source in the year of account but the Income Tax Officer on the facts as ascertained by him calculated a taxable income from this source of Rs. 22,500 which the Assistant Commissioner on appeal reduced by Rs. 1,800, this being the sum the assessee paid to the superior landlord by way of ground rent in the year of account.

The assessee then claimed that, as against this receipt, he should be allowed depreciation in respect of buildings, machinery and plant of the jute press on the ground that the income from this source was taxable under Section 10 of the Act and accordingly he was entitled to depreciation under Section 10 (2) (vi). The Income Tax Officer and the Assistant Commissioner of Income Tax refused to accept this contention and held that this income was rightly assessable under Section 12 as income from other sources.

3. The question that is referred for your Lordships' decision is:—

"Whether in the circumstances set forth above, the assessee is entitled to an allowance for depreciation in respect of the

buildings, plant and machinery leased to the Jute Pressing Company under Section 10 (2) (vi) of the Act?"

4. Section 10 (2) of the Act gives only the rules for the computation of profits or gains which are to be assessed under the head "business" and accordingly question of allowance for depreciation can arise only when the profits or gains of any business are to be computed for the purpose of assessment. In the present case the assessee can in no sense be said to have been carrying on any business by leasing out the press. Under Section 10 (2) (vi) depreciation is allowable only when an assessee is carrying on a business and it becomes necessary to compute the profits or gains of that business in order to assess such profits or gains and then again such depreciation will be allowed only if the following conditions are fulfilled :—

(1) the buildings, machinery and plant are the property of the assessee;

(2) they are used for the purpose of the business, the income of which is being taxed.

In the present case the assessee is not, in my opinion, carrying on any business by reason of this act of his leasing out of the jute press in question and his income from this lease is not and has not been treated as the profits or gains of business for the purpose of assessment. It is true that the assessee had another jute press which he purchased in 1915 and which he himself worked till 1921 but leased from the latter year to 1930 to another party and subsequently after a year's vacancy leased to a different person but this in my view does not strengthen the assessee's case for it is evident from the facts that in both instances he himself worked the jute press for a considerable period and that that was his intention at the time of acquisition and it does not follow that because at a later date he found it to his advantage to lease the presses instead of working them himself the income from these leases is income under the head 'business'. I may perhaps note in passing that the assessee himself treated the income derived from the leasing of this second press as income under the head 'property' taxable under Section 9 of the Act and never claimed that it should have been assessed as business under Section 10.

5. The assessee has claimed that in the circumstances of this case he should be held to be carrying on businesses in leasing out the press and that he is thus entitled to claim depreciation on the buildings and machinery thus leased out by him to the Jute Pressing Company. In support of his contention he places reliance on the decision of the Madras High Court in the case of *Mangalagiri Sri Umamaheswara Gin and Rice Factory Limited* v. *Commissioner of Income Tax, Madras.* In my opinion that decision has no application to the facts of the present case. The lessor in that case

was a registered company, one of the subjects of which as noted in the memorandum of association was to lease out their mill or mills. In determining the question whether any particular activity of a company would amount to the carrying on of a trade or business, its memorandum and articles of association which set out the objects of the company would certainly be an important piece of evidence and the Madras High Court arrived at the decision referred to above relying on such evidence. In the present case, however, the assessee is an individual and there is no proof of any such intention or object on his part and *prima facie* when he purchased this jute press 22 or 23 years before the date of the lease he did so for the purpose of using it for business in the ordinary sense of the term, *i.e.*, a jute press operated by himself and in fact that is what he did for a considerable period. I find it impossible to hold therefore that the activity in question amounts to carrying on business.

6. Again in the Madras case, so far as I can see, an obligation was imposed on the lessor to meet the cost of renewals and replacements as distinct from running repairs, while in this case, from Clause (b) of the terms of the lease as embodied in the letter referred to above, I infer that the assessee was required to pay only the rent due to the superior landlord.

7. If I may say so with all respect, it appears to me that the Judges in the Madras case were inclined to assume too readily that because the activity in question was, in the general sense of the term, a business activity authorised by the memorandum of association therefore the income arising from this activity must be assessed under Section 10 of the Act. That your Lordships however do not accept this presumption as final and unrebuttable is clear from your dicision in the case of the *Commercial Properties Ltd.* v. *Commissioner of Income Tax, Bengal,* where it was held that the income arising to a company, the sole business of which was the management and collection of rents from certain properties, was assessable under Section 9 of the Act and not under Section 10. There it was argued by the assessee that where the owner is a company and the objects of the company include the object of owning and managing house property, then the income that is derived from the tenants is an income that is derived from business. This argument was not accepted and in that connection RANKIN, C.J., observed "I entirely refuse my assent to the proposition that because it happens that the owner of a property is a company which has been incorporated for the purpose of owning such property, therefore the income derived from 'property' must be regarded as income derived from 'business'.

8. After a careful consideration of the principles underlying the decision cited by the assessee and of the facts and circumstances of this case I am of opinion that the income in question is not income derived from business assessable under Section 10 but is

income from other sources assessable under Section 12 of the Act.

9. I append to this statement of case a copy of—(1) Letter dated the 31st July, 1921 from the lessor assessee to the lessee of the jute press in question. (2) Assessment order. (3) Grounds of appeal. (4) Appellate order. (5) Application under Section 66 (2).

JUDGMENT.

LORT-WILLIAMS, J.—In the case the facts found are that the assessee purchased the Sulkea Jute Press is 1907, and worked it until 1930. In 1931 he leased it out for a term of one year to the Sulkea Jute Pressing Co., Ltd.—a private company in which he holds more than 60 per cent. of the shares, and that lease is subsisting, the lessee holding over under the terms of the lease. Those terms, *inter alia*, are:

(*a*) You shall pay us a nett annual rent of Rs. 22,500 only payable as follows, *i.e.*, Rs. 2,500 to be paid the 31st day of August, 1931 and the balance by four instalments of Rs. 5,000 each on the 1st November, 1931, 1st February, 1st May and 1st August, 1932.

(*b*) During the said period of one year, we shall only pay the rents payable to the superior landlords and you shall pay the municipal taxes, Fire Brigade license and all other outgoings and public charges.

(*c*) You shall carry out all repairs to the engines, machineries and plants, godowns and buildings during the said period at your own expenses.

The assessee's income from this source was assessed under Section 12 as income from "other sources". He claimed to be assessed under Section 10 as upon profits or gains of business, and to be entitled to an allowance for depreciation under Section 10 (2) (vi). The assessee had another Jute Press which he purchased in 1915 and worked until 1921, when he leased it out until 1930, and subsequently, after a year's vacancy, leased it out again.

The Commissioner decided against the assessee's contention and referred the following question for the decision of this Court:—

"Whether in the circumstances set forth above, the assessee is entitled to an allowance for depreciation in respect of the buildings, plant and machinery leased to the Jute Pressing Company under Section 10 (2) (vi) of the Act?"

The reasons for his decision are mainly that under Section 10 (2) (vi) depreciation is allowable only when the machinery and plant in question are the property of the assessee, and are used for the purpose of the business the income of which is being taxed, and secondly that the assessee originally worked the jute press

himself, and that was his intention at the time of acquisition. I cannot appreciate the cogency of the distinctionss which the Commissioner has sought to draw. The press is the property of the assessee, and is used for the purpose of the business, the income of which is being taxed, namely, the business of letting out the press. The fact that the assessee originally intended to work the press himself seems to be irrelevant.

The decision in the case of *Mangalagiri Sri Umamaheswara Gin and Rice Factory Limited* v. *Commissioner of Income Tax, Madras*, supports the assessee's contention. That the lessor in that case was a registered company seems to me to be irrelevant. It was decided that where a limited company incorporated for the purpose of milling rice, acting in pursuance of authority given in the memorandum of association leased out the buildings, plant, machinery, etc., to another company for a fixed annual rent, the lessors bearing any loss by depreciation and the lessees being liable for repairs, the company was carrying on the business of letting a rice mill, and was entitled to an allowance for depreciation under Section 10 (2) (vi) of the Income Tax Act.

In the case of *Sutherland* v. *The Commissioners of Inland Revenue*, LORD MACKENZIE stated that "It is clear, I think from what has already been read from the judgment of LORD HARDWICKE in the case of *Doddington* v. *Hallet*, and a series of subsequent cases that the letting of a ship to freight is just as much a trade as any other." In *Doddington* v. *Hallet*, LORD HARDWICKE had said that "It must be admitted that the ship may be the subject of partnership as well as anything else; the use and earnings thereof being proper subject of trade and letting a ship to freight is as much a trade as any other." The statement was approved by THOMPSON, C.B., in *Attorney General* v. *Borrodaille*.

The decision in the case of *In re Commercial Properties Ltd.*, that a company owning house-property and carrying on only the business of letting such house is liable to income tax under Section 9 of the Income Tax Act, in the same way as a private individual owning such property, is clearly distinguishable, and so is the decision in the case of *In re Kaladan Suratee Bazaar Company Ltd.* Such property consisted of buildings, or lands appurtenant thereto, within the meaning of Section 9 which specifically provides for the taxation of income from this kind of property. It has not been suggested by either party that income arising from letting out a jute press comes within the purview of this section, but that it comes under either Section 12 or Section 10.

In my opinion the letting of a jute press at a rent is as much a business as the letting of a ship to freight, or the letting of a motor-car or any other kind of machines, or machinery for hire. In *Mangalagiri's Case* (*supra*) the learned Judges pointed out that the Crown would not suffer if an allowance were made to the lessors for depreciation under Section 10 (2) (vi), because under the

conditions of the lease, the lessors had to bear the loss caused by depreciation. Therefore a similar allowance for depreciation could not be claimed a second time by the lessees, though they could claim an allowance for repairs for which they were liable under the lease.

Similarly in the present case the lessees are liable only for repairs and not for depreciation, and in no circumstances could they claim an allowance for depreciation under Section 10 (2) (vi) because the buildings, machinery etc., mentioned in that sub-section must be the property of the assessee.

The result is that the question referred to us for decision must be answered in the affirmative.

The assessee is entitled to his costs of the reference.

JACK, J. :—I agree.

Reference answered accordingly.

[IN THE NAGPUR JUDICIAL COMMISSIONER'S COURT.]

BHIKAMCHAND LAXMICHAND

v.

COMMISSIONER OF INCOME TAX, CENTRAL AND UNITED PROVINCES.

Subhedar and Pollock, A.J. Cs.

January 18, 1934.

INCOME TAX—DEPOSIT OF MONEY—INTEREST CREDITED IN DEBTOR'S ACCOUNT AND REALISABLE AT WILL—ASSESSABILITY—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 4.

Where the assessee had deposited a certain amount with a firm with whom he had business dealings and the latter credited the assessee in their accounts with the interest which had accrued due on the deposit and informed the assessee of this fact; Held, *that the interest must be deemed to have been received by the assessee and was assessable.*

Reference made by the Commissioner of Income Tax, Central and United Provinces.

STATEMENT OF CASE.

In compliance with the orders of the learned Judge of the High Court dated the 2nd March 1933, I beg to state the case as follows.

2. That facts of the case are given in my order dated 11—11—1931 a copy of which is attached for ready reference. From this order it will appear that the assessee had been disputing

the taxability of two items, one of Rs. 32,902-2-3 and the other of Rs. 18,357. As regards the second item the finding of the learned Judge of the High Court is that reference on it was correctly refused because no question of law as regards it arose. As regards the first item I am now asked to report the case on the following point only :—" Whether the assessment of income tax on Rs. 32,902-2-3 is legal in view of the fact that the amount was not actually received by the applicant during the assessment year 1929-30.

3. It has been ordered that the words "assessment year 1929-30" is a clerical error for the words "account year 1927-28". Thus the question on which I am asked to state the case runs as follows :—'Whether the assessment of income tax on Rs. 32,902-2-3 is legal in view of the fact that the amount was not actually received by the applicant during the account year 1927-28.

4. The facts of the case have fully been given in my order of the 11th November, 1931 and need not be repeated here. According to para 6 of that order, I had myself taken into account the clerical mistake as regards the accounting period referred to above and then came to the conclusion that even this amount was correctly taxed in the assessment year. From the facts stated therein it will be clear that the assessee had business accounts with Nainsukhdas Jainarain of Bikanir who has shops at Calcutta and Bombay. The assessee has inherited the estate of Bai Ambabai widow of Narasingdas Metha. The Income Tax Officer, Calcutta, Dist. I., communicated to the Income Tax Officer at Wardha, the assessing officer in this case (vide slip No. 24/2044 dated the 22—1—1930), that the said Ambabai was paid Rs. 32,905-2-3 interest by Nainsukhdas Jainarain of Jagmohan Mullick Lane, Calcutta in St. 1984-85. The agent of the assessee stated that the money was not actually received nor any settlement of accounts took place in the account year; but the Income Tax Officer disallowed the objection, and in the first reference before me it was contended that opportunity was not given for the proof of this item being not received. The case was remanded and full opportunity was then given to the assessee to cross-examine the agent of Nainsukhdas Jainarain. He did not do so and the agent of Nainsukhdas Jainarain clearly stated that this credit to the assessee was given in that year and intimation, as usual, was sent to him. Thus it was taken as proved that this was the fact.

5. It now seems to be contended that the amount was not actually received. As I have remarked before, vide para 6 of my order dated (11—11—1931) the assessee first contended that no intimation of the credit being raised in his favour was given to him. In this he has been falsified. He now seems to take the stand on the fact that it was not a cash receipt because it was only a book adjustment. In the case of persons of this class who have accounts with each other, payments and receipts are always made by book

transfer and they are as good as entries in the bank's books which are held to be receipts as good as cash payments.

6. I am therefore of opinion that this income was taxable. It was received in British India because it is entered as made in the books of the shop working in British India.

JUDGMENT.

This reference arises on a case stated by the Commissioner of Income Tax. The assessee Bhikamchand Lakshmichand, a firm of Hinganghat had a deposit with Nainsukhdas Jainarain of Bikanir who has shops at Calcutta and Bombay and has accounts with the assessee. This deposit carried interest and interest for the account year was credited to the assessee in the books of Nainsukhdas Jainarain. The assessee at first denied that he had been informed that interest had been credited to him, but this question of fact was decided against him. He then argued that, even if interest was credited in his favour in the books of Nainsukhdas Jainarain, it could not be said that he had received such interest and that therefore he was not taxable thereon. He has never pleaded that this interest would not have been paid if he had demanded it, and we must therefore assume that it was realisable by the assessee at his will.

2. Under Section 4 (1) of the Indian Income Tax Act that Act applies to all income, profits or gains accruing or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India. The Commissioner of Income Tax held that the credit entry of this interest in the books of Nainsukhdas Jainarain was equivalent to a receipt. Several cases have been cited before us in which the assessee made entries in his own accounts showing that interest had become due to him from his debtors, but those cases are not in point. We have no doubt that the Commissioner of Income Tax was correct in holding that this interest which was realisable by the assessee at will, is liable to be charged income tax. In *The Secretary, Board of Revenue* v. *Arunachalam Chettiar*, SADASIVA IYER, J., remarks at page 82: "The words 'accrue' and 'arise' are no doubt usually confined to monies which are due but not received ....If an assessee chooses to leave his interest income with his customer, who is also a banker, and does not bring it into his accounts as income on the date it falls due but he knows that the banker-customer would credit the money in his accounts in favour of the assessee and allow him interest thereon from the date of its accrual, or if the assessee could at any time draw upon the customer for that money and obtain actual receipt of that sum in due course of business, I think that such interest income has accrued and arisen in that year in such a manner that the legal effect is the same as if it had been 'received' by him, and that it is liable to be charged income tax thereon." This case was cited with approval by KINKHEDE, A.J.C. in *Sir S. M. Chitnavis* v. *The Commissioner*

of Income Tax, at page 330, where he remarked : "The test to be applied is, whether any profits in the shape of interest had become due to the creditor in such a manner as to be immediately available to him in the account year so as to be capable of being received by him at his choice and pleasure". In *Raghunandan Prasad Singh* v. *Commissioner of Income Tax, Bihar and Orissa*, LORD MACMILLAN who delivered the judgment of the Board remarked at page 396: "It is plain that the essence of the matter is that there must be an actually realised or realisable profit or loss."

3. We are therefore of opinion that, as this item of interest was realisable by the assessee at his will, it was liable to income tax and he was rightly assessable. Costs of this reference must be paid by the assessee. Counsel's fee Rs. 100.

Order accordingly.

[IN THE CALCUTTA HIGH COURT.]

In re MOOLJI SICKA AND OTHERS.

Lort-Williams and Jack, JJ.

December 13, 1934.

'HINDU UNDIVIDED FAMILY'—WHETHER CONFINED TO CO-PARCENARIES—INCOME FROM SELF-ACQUIRED PROPERTY OF HINDU LIVING WITH SONS—WHETHER ASSESSABLE AS INCOME OF UNDIVIDED FAMILY—INDIAN INCOME TAX ACT (XI OF 1922).

Where, in the sections of the Income Tax Act, a Hindu undivided family is mentioned, a Hindu co-parcenary is meant. The expression Hindu undivided family is not used in its wider sense including every Hindu joint family.

Where the income of a Hindu which is assessed is derived not from ancestral property but from his own self-acquired or separate property, which has not been thrown into the common stock, he cannot claim to be assessed in respect of such income as a Hindu undivided family even though he has sons and they live together as a Hindu joint family. A mere statement before the income tax authorities that such property is joint is not sufficient to prove that the property has been thrown into the common stock as his joint property.

Reference made by the Commissioner of Income Tax, Bengal, under Section 66 (2) of the Indian Income Tax Act.

REFERENCE :—At the instance of Moolji Sicka (Assessee) under Section 66 (2) of the Income Tax Act, I refer for your Lordships' decision the following question of law with respect to his assessment for 1931-32, namely :

"Whether, in the circumstances recorded in this case, assessee's share of income from the Firm of Moolji Sicka and Company is assessable against him in the status of a Hindu undivided family, or of an individual."

2. The Firm of Moolji Sicka and Company was first "registered" under Section 26-A of the Act for its 1930-31 assessment. It was registered as a partnership of five persons; and their shares were all assessed against them in the status of individuals. Their shares were such that only the three senior partners were affected by the differing "rates of super-tax" as imposed by the Finance Act upon individuals and Hindu undivided families. I understand that the returns of none of the five made any reference to status, but in the course of the proceedings, it was contended on behalf of those three senior partners that their status should be Hindu undivided families. They eventually applied for a reference to the High Court (in terms which are at the foot of page 29 of the printed paper-book in the case which I now go on to refer to). The case of one only, Babu Moolji Sicka, was referred and pends before the Court; the other two being held over to be disposed of in accordance with the decision to be given therein. The question actually put was apparently settled between my predecessor and the pleader of the applicants (in terms identical with the first item in Annexure A to this present reference).

3. That question posits an assumption of facts, which my predecessor nevertheless went on to hold not proved; namely that the assessees had thrown this source of income into common stock. As the Commissioner is the authority for final determination of facts, I hardly see the consequence of the question put.

He went on to propound that if the Head of a joint family entered a partnership as an individual, the fact that the family might make him accountable for the income did not affect the taxability, as the destination or disposal of income is not material to its assessment—I think this is a right summary of paragraphs 11 to 13 of his reference. This seems to be perhaps covered by the question put, but is a considerably restricted version of it.

It is necessary for me to comment thus on that case, in explanation of the different line taken in the present reference.

4. Now for the 1931-32 assessment of the Firm, a new constitution was registered, with two additional partners. The assessed shares were such that besides the above three partners, the two who had not raised or contested the issue in the previous year and also one of the two new partners were this year similarly affected by the decision of status.

It is said that the three junior partners concerned did not raise the issue at the time of the present assessments they certainly did not do so in their returns. This has resulted in the material facts not being investigated before the case reached me; and now the time available to me under the section has not been enough for me to clear them up really satisfactorily. Nevertheless, I think enough can be admitted for the purpose of the reference, and *ex concessu* I will not bar their applications on this ground.

The three senior partners have applied for the same question to be referred in this year's case, as was actually referred in the one of their cases of the previous year, as described above. The question is item 1 of Annexure A.

The three junior partners affected have propounded that question with slight adaptations to suit some differences of their family relationships, and of their original acquisition of the shares. These questions are items 2, 3 and 4 of Annexure A.

5. In my view, a direct answer to those questions would be insufficient for the disposal of the cases, and I therefore substitute the question in paragraph 1 above.

As the details of family relationships and origin of the source of income are different in each case, and the differences may possibly be found by Your Lordships to be material, I am afraid it is necessary to refer each case, without reserving any for disposal in accordance with your Lordships' decision in others of them.

6. STATEMENT OF FACTS.—The firm are merchants, principally in tobacco, and were assessed for 1931-32 on an income of Rs. 5,33,245. They had applied for registration, in terms of a partnership deed, dated 11th September, 1930: (copies of Application, and Translation of Deed are Annexures B and C). In the previous year they had been registered in accordance with a deed, dated 1st May, 1919: (translation is Annexure D). The shares under these two deeds were:—

			1919	1930
1.	Moolji Sicka	...	$5\frac{1}{2}$	$5\frac{1}{2}$
2.	Purshotham Sicka	...	$4\frac{1}{2}$	$4\frac{1}{2}$
3.	Kalyanjee Vithaldas	...	$3\frac{1}{2}$	$3\frac{1}{2}$
4.	Kanji Moolji	...	1	2
5.	Chaturbhuj Vithaldas	...	1	2
6.	Sewdas Moolji	...	...	1
7.	Champsey Vithaldas	...	...	1
			$15\frac{1}{2}$	$19\frac{1}{2}$

The Firm was assessed accordingly for 1931-32 by order, dated 12th November, 1932.

All the partners were assessed, in individual status, upon their shares (and no other income). One duplicated order was recorded in each case: (Annexure E).

The six partners affected (Nos. 1 to 6) appealed. Duplicate orders were passed for Nos. 1 to 3 and Nos. 4 to 6 : (Annexures F and G).

7. The Firm is said to have been started in 1912 by Moolji and his younger brother Purshotham, and the unrelated Kalyanjee. There is a little doubt about the source of their original funds; some was said to come from their mothers ; but it was admittedly not "ancestral" and the department will accept that Moolji and his brother were not "joint" at any material time.

8. In 1919 the constitution was apparently put under deed for the first time, taking in Kanji (Moolji's elder son) and Chaturbhuj (the elder of Kalyanjee's brothers) as additional partners. The deed was not registered under the Registration Act; and it is not contended that there were any duplicates for all parties affected. (This was specifically stated to me on 3rd May and noted accordingly. After his perusal of the draft of this reference Mr. Sarkar has written that each partner had a duplicate, and the duplicates were surrendered and destroyed when a still later deed was executed in 1931. I do not accept this and confirm my finding on fact as here stated.) The terms of this deed required "deposits" (capital) according to shares; and allowed a charge of interest upon balance in excess of these. Unfortunately the original accounts are not available; but judging from those of years that are (*vide* Annexure H), the Capital accounts were probably one lakh per share: the shares being as above. The whole surplus from Moolji's capital accounts was put in Kanji's and Sewdas' name—his two sons. The amount thus transferred to Sewdas seems to have totalled the same as the aggregate transferred to Kanji's partnership capital and surplus accounts. Purshotham seems to have had no surplus. Kalyanjee, in addition to the lakh of capital transferred to his brother Chaturbhuj's partnership-capital account, apparently put his surplus of about half a lakh in the name of his minor brother Champsi.

It appears that at this date Moolji was marrying a second wife; and he purports to have given his sons by the major wife these shares and deposits on a separation from them.

There is no particular explanation of why Kalyanjee took this same occasion for a "separation" from his brothers. The actual contention in his case is that they were all joint before, and separated ; but it might have been that he made a gift out of his own separate property.

Up to the assessment of 1925-26, the assessee always represented that he kept no accounts whatever. In 1926-27 only "cutcha" and partial accounts were tendered. The 1928-29 assessments were made on estimation, on defaults by the assessee. The 1929-30 assessment was originally made on estimate in the absence of accounts, which were said to be still "not adjusted" in

March 1930. It was subsequently found that a very large part of the business had been throughout left out of assessment, and steps were taken under Sec. 34 in August 1930. There can be little doubt that this is what led to the decisions to make the new partnership deed and to register the firm. It may also be remarked that this history greatly discounts the evidential value of any versions of capital accounts now tendered in respect of those early years.

The deed of 1930 allows interest on the whole capital, merely requiring a minimum of half-a-lakh per unit of share. It now took in Sewdas (Moolji's younger son) and Champsi (Kalyanjee's youngest brother) as partners, and added to the partnership shares of the other two junior partners. It will be seen from the figures of shares that there was no gift by any one of the partners but that the existing firm as a whole took in these new partners and gave them a share. The partners accounts' were no longer separated into deposits, etc., but were not otherwise affected.

Sewdas told me his present age was 23; and though he has previously been represented as older, I think that is about right. Though he says he is a working partner, he seemed to have practically no knowledge of the business. Champsi is apparently about the same age.

There was again no registration or duplication of the deed or other supporting evidence.

10. Moolji is living in Bombay with the second wife, and has a male child by her.

Purshotam is living in the same house, and has a male child and daughters. He is no longer active.

Kalyanji has three male children, and daughters. Until recently he was an active partner, at the branch in Gondia.

Chaturbhuj has daughters, but no male child. He too is said to be at Gondia, working for the firm, and the young brother Champsi is also there. It is stated that they are all living and messing separately; and I have been unable to confirm or discredit this. For the purpose of this case, I accept the statement.

Kanji and Sewdas live in one house, which is rented by the Firm, and is used in part also for the firm's purposes; and their mother, Moolji's major wife is with them. They said they were separate in mess and general status but on enquiry it was found that they were messing together. Sewdas now explains that it is because his wife is away, staying at present with Moolji—temporarily, he says. He was unable to say how his share of the rent was accounted for. Kanji has daughters, and no male child. Sewdas is said to have been married at the material date without issue; but he includes his mother as part of his alleged Family. It is not clear why she

should be attached to him rather than to her elder son at the same address.

11. Although any separation is alleged to date from 1919, and the parties have no other source of income, drawings of Sewdas and Champsi have been nil or negligible in any year for which accounts are available, up to the latter part of 1930, I have examined those in Sewdas ' account; and find they are only adjustment entries at the close of the account year, against what appear to be employees' accounts. Their nature seems to me very dubious, but at any rate, there seems to be no current drawings for current expenses.

As mentioned by my predecessor in referring Moolji's earlier case, there is no evidence from the accounts of any assignments to any joint family accounts or purposes. This still applies.

19. *Opinion of the Commissioner.*—It is my duty to make a finding of all facts, sufficient for the determination of the issue of law. Unfortunately the question whether an individual is or is not the Karta of a Family is an involved issue of mixed law and fact; and it is difficult for me to see what specific findings are likely to be essential. I have therefore thought it wisest to detail everything relevant in record before me, ascertained as fully as possible on twice hearing the party; up to the date of drafting this reference (which has already exceeded the statutory period).

In the concluding paragraph I have detailed the specific findings which I think necessary for determining the issue fully. If these are found insufficient in your Lordships' view a further statement can be required under Section 66 (4) of the Act.

I think it desirable to record that in ensuing assessments upon the Firm I shall require the assessing officer to investigate much more fully the genuineness of the subdivided partnerships; and it is only for the particular purposes of this case that (being out of time for reviewing it, and therefore bound to accept it) I do accept that the families were broken up as alleged in 1919; and came to no finding inconsistent therewith.

13. The following notes from Mulla's "Hindu Law" (7th Edition: page references) seem to cover the facts. The parties are Mitakshara Hindu (from Cutch).

(P. 230).—A Joint Family includes wives and daughters but a co-oparcenary—which is what is relevant—only embraces lineal male descendants. (P. 236). A mother is not included.

(P. 238).—Co-parcenary property only includes ancestral property with its derivatives, *plus* any separate property specifically put into common-stock. (P. 331). Ancestral property is only derived from a parent; what is derived from a brother is separate (P. 249). Throwing into a common-stock must be clearly established.

(P. 244).—Proceeds of partition are separate except only as regards male issue (in existence).

(P. 245).—There is conflict of opinion about gifts to a son. Their Lordships in Calcutta would bring them into co-parcenary.

(*N.B.*—I take it that gifts to a brother must be "separate").

(P. 422).—Gifts must be accompanied by effective delivery; and those to which the Transfer of Property Act applied must be in conformity with its Section 123. (*N. B.*—The property of the firm includes immoveables. I do not record any opinion whether transfer of a share in such a Firm is therefore subject to the Act.)

14. At pages 261 to 263 there is a discussion of the difference between the Head of a Family as a partner, in his relationship to strangers and to his family. I have summarised above my predecessor's contention that the claims of the family are irrelevant. I will add nothing to this contention, as it lies before Your Lordships; though I think it right to note that my own interpretation and practice have been different—if the family have a co-parcenary interest in the income I have treated it in other cases as assessable in family status.

15. In the light of those notes, my opinion is :—

Moolji : Purshotam : Kalyanjee :

As his share was self-acquired, without employment of ancestral funds, it is to be deemed "individual" in the absence of clear proof of throwing into common-stock.

Chaturbhuj : (Accepting for this purpose that there was a gift by brother), this is separate in origin : and both because there is no proof of putting into common-stock (of a non-existent co-parcenary) it remains individual.

(If it be held that Kalyanjee's separate property could be put into a co-parcenary with his brothers, and that by purporting to make a partition in 1919 he gives sufficient proof of the existence of co-parcenary prior to that date, and partition thereupon), the proceeds of the partition are separate and individual.

Kanji : Sewdas :

(Accepting for this purpose that there was a gift by his father), there is no proof of determination by the father, but Your Lordships will hold that it would be ancestral as regards male issue. As he has no male issue, it cannot be Hindu undivided family income at present.

(If, however, it be held that Moolji's original holding was in 1919 in common-stock and that there was partition, the proceeds of the partition are separate and individual).

Pugh, R. C. Ghose, Hiralal Chakravarthy and *Panchanan Ghose*, for the assessees.

The Advocate General and *Dr. R. B. Pal*, for the Crown.

JUDGMENT.

LORT-WILLIAMS, J.—This is a case stated under Section 66(2) of the Income Tax Act (XI of 1922).

Originally the question of law submitted for the opinion of this Court was "whether in the circumstances recorded in this case, assessee's share of income from the firm of Moolji Sicka and Company is assessable against him in the status of a Hindu undivided family or of an individual."

The firm of Moolji Sicka and Company was first registered as a partnership of five persons and their shares were assessed as individuals. Each of the partners contended that they ought to be assessed as five Hindu undivided families.

The Commissioner found as a fact that none of the assessees had succeeded in proving that they had thrown their separate income into common-stock. This was in respect of the 1930-31 assessment and was based on a partnership deed of 1919.

The present case arises on the assessment for 1931-32 and is founded on a partnership deed of 1930.

The facts which have been found show that the firm was started in 1912 by Moolji Sicka, his brother Purushotam and Kalyanjee with funds which were not ancestral. The funds of Mooji and Purshotam were apparently derived from their mother. These two were not joint at any material time.

In 1919 a deed of partnership was executed and Kanji, Moolji's son, and Chathurbhuj, Kalyanjee's brother, were added as partners, About the same time, Moolji married a second wife, which led to family complications, and he and his sons decided to live apart. He transferred to each of them a part of his interest in partnership, and his first wife went to live with them. Kalyanji and his brothers Chaturbhuj and Champsi also agreed to live separately, and Kalyanji transferred a part of his interest to each of them.

For several years difficulties were experienced by the income tax authorities in obtaining any satisfactory accounts from the firm, and in 1930 steps were taken, under Section 34 of the Act, against the assessees. One result was that a further deed of partnership was executed under which Sewdas (another of Moolji's sons) and Champsi, the other brother of Kalyanji, became partners, and shares were allotted to them.

Moolji lives in Bombay and has a son by his second wife. Purshotam lives in the same house and has a son and daughters. Apparently he no longer takes any active part in the business. Kalyanji is at the firm's branch at Gondia. He has three sons and daughters. Chaturbhuj has a daughter but no son. He and Champsi are at Gondia. All these live separately. Kanji and Sewdas live in the same house with their mother, but they live

separately. Kanji has daughters only. Sewdas has no issue, but includes his mother in his alleged family.

It has been found as a fact that none of the assessees has made any assignment to any joint family accounts or for any joint purposes. The opinion of the Commissioner was that as the shares of Moolji, Purshotam and Kalyanji were all self-acquired without the employment of any ancestral funds, and as there was no proof that any of them had thrown his share into common stock, the shares were to be deemed individual for the purpose of income tax. He decided that as Chaturbhuj's share came from his brother Kalyanji's self-acquired property, and he has no son, and as there was no proof of his having thrown his share into the common stock of a non-existent co-parcenary, the share remained individual. Further, he decided that even if Kalyanji's separate property could have been treated as held in co-parcenary with his brothers prior to 1919, yet after the partition (if any) the shares were separate and individual. That even assuming that Kanji and Sowdas's shares were gifts by their father out of self-acquired property, there was no proof of Moolji's determination that the shares were to be held by either as ancestral property, and that though it might became ancestral if sons were born to Kanji and Sewdas, it cannot at present be regarded as other than separate and individual. Further he held that even if Moolji's self-acquired property was being held in common stock in 1919, yet after the partition it had become separate and individual.

He stated that at the time of assessment none of the assesses claimed to be a karta of a Hindu undivided family, nor did they so describe themselves in the returns made by them, nor in their petitions to the Income Tax Officer, nor in their applications for registration of the firm, and no such description is mentioned in the partnership deeds. Until the appeal to the Assistant Commissioner, they did not suggest that they were other than individuals so far as taxation under the Income Tax Act was concerned. It is alleged that in a former affidavit relating to some prior assessment some of the assessees claimed that they were *kartas* of Hindu undivided famileis, but this evidence is not before us and forms no part of the present case.

This reference by the Commissioner was made on the 8th June, 1933. At or about that time, certain further affidavits were filed. The Commissioner says, in an Appendix to the Paper-book that the application for reference to the High Court was made on the 14th January, 1933. Appellants were heard on various dates up to the 3rd May, and the Commissioner stated the case on the information on record up to that date. Subsequent to the drafting of the reference, three affidavits were filed which the Commissioner has appended to the case at the request of the applicants. Concerning those affidavits, the Commissioner says that in his opinion they ought not to be considered, that the

statements contained in them are contrary to the facts recorded, and that there was no evidence of any of the assessees having thrown his property into common stock. It is to be noted in passing that in all the three affidavits the deponents state that they always treated their earnings as belonging to their joint families, and nowhere state that these earnings were, in fact, joint property.

Upon consideration of the case stated, the Court decided that the findings of fact were not specific or sufficient nor were they properly stated, and referred the case back to the Commissioner and we have now to consider the Supplementary Statement made under Section 66 (4).

In the meantime, the Commissioner was succeeded by another Commissioner, and this Commissioner states that the circumstances which were recorded by his predecessor in the several cases were as follows:—

(1) *Moolji's case*:—He does not claim to be a member of any ancestral undivided family. His case is that he is separate from his brothers and from his sons by his first wife, that he is living with his second wife and a male child by her, and that he and they constitute a Hindu undivided family. The fund with which he started the business was not ancestral. He became a partner in his individual capacity and not as representing any family. His share was self-acquired. He failed to prove that it was thrown into common-stock. He started the partnership in 1912 with his self-acquired funds and in his individual capacity, and even if it be assumed that this became a joint fund with his sons then by partition in 1919, he ceased to have a joint fund thereafter. He kept his capital in and earnings from the partnership as his own separate property, and all that he did in 1919, was to make a gift to each of his sons of a certain amount of money wherewith they became partners.

(2) *Purshotam*:—His case is that he is separate from Moolji, and not a member of any ancestral joint family. He is living with his wife and an infant son and daughter. He claims that they constitute a Hindu undivided family. He also became a partner in his individual capacity and not as representing any family. His capital was self-acquired property. No ancestral funds were employed in obtaining his partnership. He failed to prove that his earnings were thrown into common-stock.

(3) *Kalyanji*:—He is not a member of an ancestral joint family. His family consists of his wife, three male children and a daughter. He is not joint with his brothers. They live and mess separately. He became a partner in his individual capacity without employing any ancestral funds. His share is self-acquired. He has failed to prove that his earnings were thrown into common stock. He became a partner in 1912 with his self-acquired funds, and always acted in his individual

capacity. What he did in 1919 amounted merely to the making of a gift of a part of his own money to his brother. Even if the capital and the earnings are to be taken as joint up to 1919, since 1919 when this alleged partition occurred, the property of each of them became separate.

(4) *Chaturbhuj* :—His family consists of himself, his wife and a daughter, and no male child. He is not a member of an ancestral joint family. His share in the capital was transferred from Kalyanji's account in the firm. He has failed to prove that his earnings were thrown into common stock. Even assuming that he was joint with his brother before 1919, what he got as a result of the partition in that year became his separate and self-acquired property.

(5) *Kanji* :—He is Moolji's son by his first wife. He separated in 1919. His family consists of his wife and daughter and no male child. He and his brother Sewdas live in one house with their mother, and mess together. His share of the capital came by way of transfer from Moolji's account. This was really a gift by Moolji out of his own self-acquired money.

(6) *Sewdas* :—He is another son of Moolji by his first wife. He separated in 1919. His family consists of himself, his wife and mother. He has no issue. He became a partner in 1930. His capital was taken by transfer from Moolji's account. This was really a gift made by Moolji out of his own self-acquired property.

The Commissioner states that he accepts the evidence of his predecessor and finds the facts again as found by him. In accordance with the directions of this Court he has carefully examined the evidence and has enquired further into the following matters in particular.

1 (*a*) Whether the capital in the firm belong to the assessees in their individual capacities?

1 (*b*) Whether they entered into the partnership as representing the family, or acted in any way on behalf of the family when entering into the partnership?

(2) Whether there is any common stock of the family?

(3) Whether the assessees treated their earnings as belonging to the family? Or have they kept their earnings separate? Or have they thrown them into common stock?

(4) Who are the members of the family of each of the assessees?

(5) Whether the family of the assessees as it now stands is a Hindu undivided family within the meaning of the Income Tax Act?

He states, and this is correct, that the last question is not a pure question of fact, and he formulates two further questions for the opinion of this Court in lieu of the question stated by his predecessor.

(1) Whether the family of the assessee as it now stands is a Hindu undivided family within the meaning of the Income Tax Act?

(2) If the first question be answered in the affirmative whether in the circumstances recorded in the case the income in question should be treated as income of that family and assessed as such?

On further consideration he finds the following facts:

1 (*a*) The nucleus of the capital with which the three original members of the firm, *viz.*, Moolji, Purshottam and Kalyanjee started the business was not 'ancestral.' The capital supplied by them belonged to these assessees in their respective individual capacities and was their self-acquired property. As regards the capital supplied by the three added members (*viz.*, Kanji, Chaturbhuj and Shewdas), this also belonged to them in their individual capacities because they got it by way of gift, and it was their self-acquired fund.

1 (*b*). On the question whether or not all of them purported to act for the family in the partnership, he refers to the fact that in none of the deeds of partnership are they described as *Kartas* of Hindu undivided families nor is he satisfied that the alleged partition between Mooljee and his sons, was, in fact a partition of property which, previous to that date had been joint family property. He says that the evidence before him was not sufficient to establish it.

With regard to the three additional affidavits the Commissioner came to the conclusion that these had been filed because the assessees realized the defects in their case and wished to strengthen. He says that he attaches no value to these affidavits, which I understand to mean that he does not believe the facts stated therein. He says also that he was not satisfied with the explanation given that the accounts of the business have been mislaid, and it is obvious from his statement, that he came to the conclusion that the assessees were keeping back accounts in order to prevent the Commissioner from enquiring too closely into the extent of the business which they were carrying on. The result was that he found as a fact that there was no joint family fund in any of the cases, that each of the partners became partners with their separate self-acquired funds, and that none of them threw their funds into the common stock of their respective families. In fact, there was no evidence that there ever had been any common stock.

Apart from these affidavits, he says that there is no evidence that Kanji and Sewdas got their shares from their

father by partition, or that Chaturbhuj got his share from his brother Kalyanji similarly. Indeed at the last hearing before him it was admitted that the origin of Kalyanji's capital was unknown, and he was asked to presume that Kalyanjee had ancestral property which was later divided. Except for the three affidavits stating that each of the assessees maintained his family out of his earnings, he found that there was no evidence to show that either property or earnings had been thrown into common stock, or that the income had been treated as income of the family. The assessees kept the properties at their own absolute disposal.

The Commissioner then dealt with the question, what is a Hindu undivided family within the meaning of the Act, whether it connotes a family having co-parcenary interest in income or property, or does it simply mean a family with several members living together irrespective of the existence or non-existence of any co-parcenary property, and he quoted from Mayne's Hindu Law, 9th Edition, 346, the following—"Section 269. It is evident that there can be no limit to the number of persons of whom a Hindu joint family consists, or to the remoteness of their descent from the common ancestor, and consequently to the distance of their relationship from each other. But the Hindu co-parcenary, properly so-called, constitutes a much narrower body. When we speak of a Hindu joint family as constituting a co-parcenary, we refer not to the entire number of persons who can trace from a commom ancestor, and amongst whom no partition has ever taken place; we include only those persons who by virtue of relationship, have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burthen it with their debts and at their pleasure to enforce its partition. Outside this body, there is a fringe of persons who possess inferior rights such as that of maintenance, or who may under certain contingencies, hope to enter into the co-parcenary", and he arrived at the conclusion that the legislature, in using the expression 'Hindu undivided family', had in view a family which in the eye of law is the owner of the income, and did not intend the expression to connote a mere combination of persons who have no legal claim to such income, or right to insist on a division on such income. Therefore he held that in none of these cases was there a Hindu undivided family within the meaning of the Income Tax Act.

Further he stated his opinion that even if he were wrong upon the first point, yet in view of the facts found that the income of each of the assessees was self-acquired, and had not been thrown into common stock, and there had been no waiver by the acquirers of their separate rights, the income in each case remained individual thoughout, and was rightly assessed by the Income Tax Officer as that of an individual.

In this case, a good deal of time and trouble has been caused by the inability of the Commissioners to distinguish between questions

of law and questions of fact. The result has been that, being in doubt, they have left a considerable part of their own burden to be discharged by this Court. This task is really not very difficult if the Commissioner will make an effort to think clearly. The origin and source of property, or income are matters of fact. Whether property or income has been treated as separate or as ancestral, or joint is a question of law, or of mixed law and fact. Whether property or income has been treated as separate or as joint, or has or has not been thrown into common stock are questions of fact. But whether the alleged owners are entitled to treat it as separate, or whether it must be regarded as joint, is a question of law or of mixed law and fact. In this case, all questions of pure fact have been found against the contention of the assessees.

The first question of law to be decided is, what is meant by the expression "Hindu undivided family," in the Income Tax Act. I have already referred to a quotation from Mayne on this point, and the remarks of the late Sir Dinshaw Mulla at page 230 of the 7th Edition of his work on Hindu Law are similar. Is the meaning to be restricted to the narrower, or extended to the wider body mentioned by these authors, that is to say, is to be restricted to the co parcenary, or extended to the Hindu joint family?

The necessity for making Hindu undivided families liable as such for income tax was, that the income and property of Hindu undivided family is undivided. The members have no separate income or property and cannot, therefore, be taxed as individuals. According to Mitakshara, until partition it cannot be said of any member that he has any definite share in the joint property. But an Income Tax Act obviously is concerned only with income available for taxation and the owners of such income, and if there is no property or no income, an Income Tax Act has no application It follows that the Act has no application to a Hindu undivided family in the wider sense to which I have referred. Its provisions are attracted only where there exists property or income, that is to say, where there is joint family property or joint family income or, in other words where there exists a Hindu co-parcenary.

Mr. R. C. Ghose, Mr. Hira Lal Chakravarty and Mr. Panchannan Ghose on behalf of various assessees have raised most interesting arguments to prove that a Hindu undivided family may be in possession of joint property or income in the absence of the existence of any co-parcenary. They have pointed out that both wives and daughters have rights of maintenance, and the sons have certain rights even in their father's self-acquired property. Consequently they have contended that these are co-owners, though they may not be co-parceners. To take one example. Where two brothers with wives, or wives and daughters, but no sons are co-parceners, and one brother dies, their contention is that the Hindu

undivided family does not come to an end, though the co-parcenary does, because there must be two co-parceners at least, and neither wife nor daughter can be co-parceners. Similarly, it has been argued that the self-acquired property of a father may be ancestral property in the hands of his son, even though he may not have sons of his own alive or yet born.

Undoubtedly there are parts of the text of Mitakshara and judicial decisions which support such a view. Thus with reference to the effect of a bequest of self-acquired property by a father to his son, it is stated in Sastri's Hindu Law, 7th Edition, at page 345, that there is great diversity of opinion on this point which was left open by the Privy Council in the case of *Lala Ram Singh* v. *Deputy Commissioner of Partabgarh,* (50 I. A. 265). The author refers to the relevant texts from the Mitakshara, to which my attention has been drawn, and comes to the conclusion that a gift of self-acquired property by the father becomes the self-acquired property of the son, unless the donor limits the rights of the son in express terms. On the other hand, at page 361, he admits that according to the Mitakshara, a son acquiries from his birth a right also to the self-acquired property of his father, but states that the character of this right materially differs from that acquired in ancestral property.

But Mulla in the 7th Edition, at page 239 states that the self-acquired property of a Hindu belongs exclusively to him. No other member of the co-parcenary, not even his male issue, acquires any interest in it by birth. He may sell it or he may make a gift of it or bequeath it by Will to any person he likes. It is not liable to partition and on his death intestate, it passes by succession to his heirs, and not by survivorship, to the surviving co-parceners, *Katama Natchiar* v. *The Raja of Shivagunga* (1863) 9 M.I.A. 543 and 613. In my opinion, this is the correct view, and the decisions in the cases of *Muddun Gopal* v. *Ram Buksh,* (1863) W.R. 71 and *Hazari Mall Babu* v. *Abaninath Adhurjoya* (17 C. W. N. 280) mean no more than that self-acquired property given by a father to his son, becomes ancestral in the hands of the son only upon the birth of his son, that is to say, it is ancestral property in the hands of the son *vis-a-vis* his son or sons. It is to be observed also that these decisions have reference only to immoveable property. Dr. P. N. Sen in his book on Hindu Jurisprudence, being the Tagore Law Lectures for 1909, states at 129-131, that, as he understands the Mitakshara, the right acquired by a son by birth in the property of his father is not limited to any particular kind of property, but extends over all the property of the father, however acquired, although the extent of the right is not everywhere the same, but depends on the nature of the property. He then discusses the various texts at length and shows that they are conflicting and attempts to reconcile them. Their Lordships of the Privy Council in the case of *Rao Balwant Singh* v. *Rani Kishori* (25 I. A. 54) observed that "All these old text-books and commentaries are apt

to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws." This fact undoubtedly gives rise to the difficulties which are met with in attempting to construe the various and apparently discrepant texts of the Mitakshara, and I sometimes wonder, when it becomes my duty to consider them, whether in many cases it is possible to reconcile them, or to dissolve the various dilemmas which have arisen in attempting their interpretation, especially in a case such as this, where we have to consider ancient texts in an attempt to construe the terms of a modern Act of the legislature.

With regard to the rights of maintenance etc., of wives and daughters, several authorities have been quoted to show that they have certain rights of co-ownership in their husband's or father's property. This matter is discussed in *Banerjee's* Marriage and Stridhana, 3rd Edition, at p. 146 and following pages. The author draws attention to the rights of a wife to a share on partition and shows that, in one sense, the wife has been regarded as a co-owner with her husband. Sir Dinshaw Mulla, at p. 577 of the Edition to which I have already referred, describes the right of a wife to maintenance by her husband as a matter of personal obligation. He says that "maintenance being a matter of personal obligation, the wife has no claim for maintenance against her husband's property in the hands of a transferee from him." On the other hand, Mayne, in the 9th Edition, says that the "right of a widow to her maintenance arises by marriage and that of a daughter by birth, it exists during the life of the father and continues after his death. It is a legal obligation attaching upon himself personally and upon his property. He cannot free himself from it during his life-time, and it attaches upon the inheritance immediately after his death. It seems, therefore, contrary to principle to hold that, by devising the property to another, he could authorise that other to hold it free from claims which neither he himself nor his heir could have resisted." Golap Chandra Sarkar Sastri in the 7th Edition of his work on "Hindu Law" at p. 362 discusses the character of ownership in Hindu Law. He says that "ownership or rather co-ownership has a peculiar meaning in Hindu Law; persons entitled to some of the rights that constitute ownership or dominion or property in modern jurisprudence, are called co-owners in Hindu Law of the person having all the rights included in ownership; the wife is declared to become co-owner of the husband from the time of their marriage. . . . The wife and the male issue hold a subordinate position with respect to the ownership of the property of the husband and of the paternal ancestors respectively."

Whatever these rights may amount to, I am satisfied that the Income Tax Act is not concerned with them, and that the legislature did not intend to enact and has not enacted that a Hindu undivided family in these wider senses is a proper object for taxation under the Income Tax Act. If it were otherwise, a most

absurd and unanticipated position would arise. Every Hindu possessing property or income who married would, *ipso facto*, become with his wife a Hindu undivided family and subject to taxation as such. The Income Tax Act, so far as Hindus are concerned as individuals, would apply only to bachelors. This cannot have been intended. In my opinion, therefore, where in the sections of the Income Tax Act a Hindu undivided family is mentioned, a Hindu co-parcenary is meant.

This is sufficient to dispose of the cases of Kanji, Sewdas and Chaturbhuj. Whichever is the correct view about self-acquired property, it seems to me to make no difference to the decision in this case. Whether Kanji's interest in this firm is in law self-acquired or ancestral property is irrelevant. The crucial point is the existence or otherwise of a co-parcenary. Kanji, Sewdas and Chaturbhuj have no sons, and it is beyond dispute that under Hindu Law females cannot be co-parceners. There cannot be coparcenary without co-parceners. There must be a co-parcenary in fact before there can be one in law. In the absence of sons it is clear that neither Kanji, Sewdas or Chaturbhuj can possibly be regarded as members of three separate co-parcenaries. A co-parcenary under the Mitakshara can only start with the birth of a son, as stated in Mulla, 7th Edition, at page 326.

The position with regard to Moolji, Purushottam and Kalyanji is different. Each has a son or sons. But it has been found as a fact in each case that the origin of their capital was in no sense ancestral, and that they have always treated it as separate, and have never thrown either property or income into common stock. Mr. Pugh has argued on behalf of Moolji that the statement in his affidavit, that the property was joint, amounted to a declaration which was irrevocable, and *ipso facto* created a co-parcenary of which the members were himself and his son, and that his son became thereupon clothed with all the rights of a Hindu co-parcener and could ask for partition and claim his share in the property.

But such a statement is only evidence which goes to prove the intention of the maker. As Sir Dinshaw Mulla states at p. 249 of the Edition to which I have already referred "Property which was originally the separate or self-acquired property of a member of a joint family may become Joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established, and it will not be inferred from the mere fact of his allowing the other members of the family to use it jointly with himself." Such a statement as is contained in the affidavit is not conclusive. It may have been made and, in the opinion of the Commissioner, was made in order to defeat the claims of the Income Tax Authorities. It has been disbelieved by both Commissioners. If the son ever claims co-parcenary

right against his father, this statement may be available as evidence against him, though even this is not certain, having regard to the provisions of Section 54 of the Income Tax Act. But it is not conclusive any more than a declaration about a desire to separate is conclusive evidence of intention upon the question whether a partition has been effected or not. The Commissioner has found in all three cases that there was, in fact, no such intention, and the property was never thrown into common stock, but was always treated as separate.

The result is that the answer to the first question put by the Commissioner must be in the negative; the second question therefore does not arise.

The assessees must pay the costs of this reference, exclusive of any extra costs caused by the reference back. Costs to be taxed by the Taxing Officer.

JACK, J.—I agree.

Reference answered accordingly.

[IN THE ALLAHABAD HIGH COURT.]

SAHU JAGMANDAR DAS AND OTHERS

v.

COMMISSIONER OF INCOME TAX, U. P.

Niamatullah and Bennet, JJ.

November 30, 1934.

INCOME TAX—INTEREST—DECREE AGAINST DEBTOR FOR INTEREST—AMOUNT CREDITED IN ACCOUNT BOOKS BUT NOT REALISED—ASSESSABILITY—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 2, 13 AND 16.

The assessee who carried on money-lending business obtained a decree for Rs. 23,012-6-0 against a debtor for the balance due from him on account of a mortgage debt in the year of account. In the books of the assessee in the ledger of the mortgagor this decretal amount was credited to the mortgagor and debited. The amount was also shown in the interest ledger on the credit side. No part of the amount had however been actually realised. On a reference by the Commissioner: Held, *that the said amount of Rs. 23,012-6-0 was not taxable income and the assessee was right in stating that the books were kept simply for the purpose of ascertaining his financial state.*

The words 'accruing' or 'arising' in Section 4, Income Tax Act, refer to the connection between the income and the country in question and they do not explain what is income or what is not

Cases referred to :

COMMISSIONER OF INCOME TAX v. S. M. CHITNAVIS [1929] (117 I. C. 258; 12 N. L. J. 17; 25 N. L. R. 35; A. I. R. 1929 Nagpur 50; 3 I. T. C. 321).

COMMISSIONER OF INCOME TAX v. KAMESHWAR SINGH [1933] (A. L. J. 527; 60 I. A. 146; 37 C. W. N. 598; 12 Pat. 318; 37 L. W. 701; 142 I. C. 437; 35 Bom. L. R. 731; A. I. R. 1933 P. C. 108; 1933 I. T. R. 94).

COMMISSIONER OF INCOME TAX v. NANHELAL [1928] (A. I. R. 1928 Nag. 241; 24 N. L. R. 176; 111 I. C. 159; 3 I. T. C. 28).

NARAYANDAS BHAGWANDAS v. COMMISSIONER OF INCOME TAX, LAHORE [1934] (A. I. R. 1934 Lah. 408; I. L. R. 15 Lah. 486; 152 I. C. 67).

PANDURANG RAMCHANDRA v. COMMISSIONER OF INCOME TAX [1926] (A. I. R. 1926 Nag. 180; 91 I. C. 980; 21 N. L. R. 175).

RAGHUNANDAN PRASAD SINGH, *In re* [1929] (A. I. R. 1929 Pat. 476; I. L. R. 9 Pat. 48).

RAGHUNANDAN PRASAD SINGH v. COMMISSIONER OF INCOME TAX [1933] (A. L. J. 564; 14 P. L. T. 227; 1933 M. W. N. 429; 57 C. L. J. 294; 37 L. W. 691; 142 I. C. 446; A. I. R. 1933 P. C. 101; 64 M. L. J. 544; 37 C. W. N. 517; 1933 I. T. R. 113).

SECRETARY, BOARD OF REVENUE, MADRAS v. ARUNACHALAM CHETTIAR [1921] (I. L. R. 44 Mad. 65; 59 I. C. 482; A. I. R. 1921 Mad. 427; 1 I. T. C. 75).

Civil Miscellaneous Case No. 117 of 1934. Reference by the Commissioner of Income Tax, U. P., under Section 66 (2) of the Indian Income Tax Act.

STATEMENT OF CASE.

"The assessee is a Hindu undivided family, the members of which are the four brothers (1) Rai Bahadur Jagmandar Das, (2) Lala Ram Sarup, (3) Lala Mulchand and (4) Lala Sumat Prasad of Najibabad, District Bijnor. It carries on the business of money-lending and has income from property and other sources specified in paragraph 3 of this statement.

The assessee maintains accounts by the Dasehra year and the "previous year" for the purposes of its assessment for the year 1932-33 was the year ending Dasehra 1988, corresponding to October, 1931.

On the basis of the accounts for that year, the Income Tax Officer, Muzaffarnagar who was the proper assessing officer in this case, assessed the family on a total income of Rs. 20,979 to income tax amounting to Rs. 2,016-11-0 and surcharge amounting to

Rs. 489-5-0. The details of the total income assessed are as follows:—

			Rs.
(1)	Salary	...	1,200
(2)	Interest on Securities (tax-free)	...	600
(3)	Property	...	492
(4)	Business	...	18,687
		Total Rs. ...	20,976

Items (1) to (3) are not in dispute. The item in dispute is the income from business (4), which is derived entirely from interest on loans advanced in the pursuit of the money-lending business.

According to the books produced by the assessee the credits to the interest ledger amounted to Rs. 27,165 and the payments to Rs. 8,478, the difference of Rs. 18,687 being the amount assessed by the Income Tax Officer as the assessee's income from business for the assessment year 1932-33. The credit side of the ledger included an item of Rs. 23,269 representing interest on a mortgage executed by one Mufti Tawaqqul Husain in the year 1918. The consideration for the mortgage was Rs. 8,000, which was originally debited to the ledger of the mortgagor. As against this debit Rs. 9,345 were credited on different dates between 9th May, 1921, and 20th October, 1923, on account of the sums repaid by the mortgagor. Subsequently the assessee filed a suit for the recovery of the balance, on account of interest, etc. due under the mortgage and obtained a decree for Rs. 23,012-6-0 in the account year. This amount was credited to the ledger of the mortgagor, with the result that the total credits to the account amounted to Rs. 32,447-6-0. As against this Rs. 1,178-6-0 were debited on account of costs and the account squared by debiting to it Rs. 23,269 and crediting the same amount to the interest ledger. It is common ground that the decree is still in the course of execution and that no part of the interest assessed has been realised. It was urged before the Income Tax Officer that the amount of Rs. 23,269 might be excluded from the assessment as it was not likely to be realised. But this contention was overruled, on the ground that according to the method of accounting regularly employed by the assessee, interest when decreed, was credited to accounts in the year in which the decree was passed and if the decree was subsequently not realised the balance was written off as a bad debt. The assessees' accounts revealed that, conformably to this practice, the assessee had, in the case of another judgment-debtor, Abdul Karim Abdul Latif, credited interest to the interest ledger in the year in which the decree was passed and debited it to the personal ledger of the debtor. The amount which was realised in the "previous year", *i.e.*, in the account year on the profits of which the assessment in dispute was based was credited to the account of the judgment-debtor and the

balance which was included in the amount debited to the interest ledger was written off as a bad debt and allowed to the assessee. The Income Tax Officer, therefore, declined to exclude the interest credited to the ledger and assessed the assessee in the amount mentioned above. Appendix A is a copy of the assessment order.

Dissatisfied with the assessment the assessee preferred an appeal but was unsuccessful. It was admitted before the Assistant Commissioner that the method of accounting regularly employed by the assessee was as described by the Income Tax Officer. Nevertheless, relying on the rulings in the case of *Seth Nanhelal Ghasiram* and *S. M. Chitnavis* v. *Commissioner of Income Tax, Central Provinces* (III I. T. C., pages 28 and 321) and *Raja Raghunandan Prasad Singh* v. *Commissioner of Income Tax, Bihar and Orissa* the assessee contended that the interest should not have been assessed when it was not realised. It was further contended that the decree in the case of Abdul Karim Abdul Latif, which was cited by the Income Tax Officer as an example to illustrate the method of accounting regularly employed by the assessee, was on a different footing, being a simple money decree enforceable against the person and the property of the debtor, while the one in question was on foot of a mortgage enforceable solely against the property mortgaged, and that the entire amount of interest should not have been assessed as the property was not worth more than Rs. 8,000. The Assistant Commissioner, after discussing the authorities quoted and after weighing the contentions raised by the assessee, dismissed the appeal, holding that the facts in the case of Raja Raghunandan Prasad Singh were not on all fours with those of the present case and that having regard to the recent decision of their Lordships of the Privy Council in the case of *Maharajadhiraj Kameshwar Prasad Singh of Dharbanga* v. *Commissioner of Income Tax, Bihar and Orissa*(A.I.R. 1933P.C. 108, decided on 24th January,1933), the Central Provinces rulings did not apply. He also held that the distinction drawn by the assessee between the decrees in the two cases mentioned above was a distinction without any essential difference so far as the treatment of the interest in the accounts was concerned and that the question of what the property was worth did not arise as the decree was still in the process of execution. A copy of the appellate order will be found in Appendix B.

In a combined petition under Sections 33 and 66 (2) (Appendix C) the assessee now desires that I should either set aside the assessment order or refer to the Hon'ble High Court the following questions of law propounded on its behalf:

(*i*) "Whether the unrealised decree of Rs. 23,269 against Talatul Husain and others entered in the interest khata is taxable income for the purpose of income tax, while in fact the amount has not been received at all and whether the assessment of the applicant is correct under the law ?"

(*ii*) " Whether the system of keeping the account adopted by the assessee is simply for the purpose of ascertaining the financial state of the family in a particular year or is open to the interpretation put by the Income Tax Officer ? "

The object of the assessee in adopting the method of accounting was not the subject of contention before the Income Tax Officer and the Assistant Commissioner and the first part of the second question does not, therefore, arise out of the appellate order under Section 31. The two questions framed by the assessee in effect really mean one and the same thing and are covered by the following question of law :—

In the circumstances stated, the method of accounting regularly employed being as described, was the Income Tax Officer wrong in taking into consideration the amount of Rs. 23,269 credited by the assessee to the interest ledger ?

Apart from the admission before the Assistant Commissioner, the assessee had, in the assessment year 1928-29, obtained a deduction of Rs. 2,926 on account of bad debts in similar circumstances when three years prior to the account year concerned, it had obtained a decree for Rs. 8,102 against one Mubarikul Nishan and subsequently in the account year the property of the judgment-debtor was purchased by it for Rs. 5,200. This it would not have obtained had the accounts been based on the cash basis. It would have been entitled only to the excess of the principal sum and the costs over the amount for which it had purchased the property. Again, in the assessment year 1929-30 the Income Tax Officer of the time notes as regards the assessee's method of accounting that " when a suit is instituted for the recovery of a certain sum, accrued interest for the period under consideration is debited to the personal account." The assessment in dispute involves no departure from the method regularly employed by the assessee and agreeing in the finding of the Income Tax Officer and the Assistant Commissioner I am unable to give the assessee the desired relief. I, therefore, submit the above question of law for the decision of the Hon'ble High Court with an expression of my opinion which is as follows :—

The provisions of Section 13 of the Income Tax Act, which is the relevant section for computing the income from business, are mandatory. When an assessee regularly employs a particular method of accounting, the Income Tax Officer has no option but to give effect to it, unless, as stated in the proviso to the section, the method employed is such that " in the opinion of the Income Tax Officer income, profits, and gains cannot properly be deduced from it......" In this case the proviso to the section does not come into operation as the Income Tax Officer does not dispute the susceptibility of the method to indicate the profits of the assessee and there is no dispute as regards the method of accounting

employed. It is, therefore, immaterial whether the interest has been realised or not and I am of the opinion that the question should be answered in the negative.

As required by Rule 7 of the rules framed by the High Court a relevant portion of the statement of the case was sent to the assessee. The assessee desires that I should send the complete file of the assessment record to the Hon'ble High Court. This I consider to be unnecessary as all the facts have been stated in full in the statement to which no objection has been raised."

Vishwa Mitra, for the assessee.

K. Verma, for the Crown.

The judgment of the Court was delivered by

Bennet, J.—This is a reference by the Income Tax Commissioner at the instance of an assessee, a Hindu undivided family. The two questions referred are:—

(1) Whether the unrealised decree of Rs. 23,269 against Talatuf Husain and others entered in the interest Khata is taxable income for the purpose of income tax, while in fact the amount has not been received at all, and whether the assessment of the applicants is correct under the law? and (2) whether the system of keeping the account adopted by the assessee is simply for the purpose of ascertaining the financial state of the family in a particular year or is open to the interpretation put by the Income Tax Officer?

The assessment was made according to the income tax authorities on the books of the assessee, and it is claimed that the amount of a decree, Rs. 23,012-6-0, which the assessee obtained in the account year and which was on account of the balance of interest on a certain mortgage, should be shown as the income of the assessee. The books of the assessee showed in the ledger of the mortgagor that there was this decretal amount credited to the mortgagor and also debited. The amount was also shown in what is called the interest ledger as an amount which was to be realized. It is not disputed that no part of the amount was realized during the year in question. The claim for the Department is that the books should be used for accounting and assessment in accordance with Section 13 of the Indian Income Tax Act. In other words, the proposition is that, although none of the decretal amount was received the assessee should be charged income tax on this amount, because the assessee has shown the amount in his books. We consider that the Department was correct in claiming that the assessment should be made on the books under Section 13; but we do not think that the Department had used the books in the right way. The Commissioner claims that under the ruling reported in *Commissioner of Income Tax* v. *Kameshwar Singh of Darbhanga* he is entitled to charge the assessee income tax on this decretal

amount. We do not consider that this conclusion follows from that ruling. There have been a number of rulings to the contrary, such as, *Secretary, Board of Revenue, Mádras* v. *Arunachalam Chettiar*; *Pandurang Ramachandra Pande* v. *Commissioner of Income Tax; Commissioner of Income Tax* v. *Nanhelal*; *Commissioner of Income Tax* v. *S. M. Chitnavis*; *In the matter of Raghunandan Prasad Singh* and *Narain Das Bhagwan Das* v. *Commissioner of Income Tax*. Reference was made for the assessee to *Raghunandan Prasad Singh* v. *Commissioner of Income Tax*; but we do not consider that this case has any bearing on the point. Learned counsel for the Commissioner referred to Section 4 of the Income Tax Act, which states that

"the Act shall apply to all income, profits or gains.........from whatever source derived, accruing or arising or received in British India, or deemed under the provisions of this Act to accrue or arise, or to be received in British India."

His argument was that the words "accruing or arising" would apply to this decree. We consider that these words merely refer to the connection between the income and the country in question, British India, and that they do not explain what is income or what is not income. We consider that words used in an Act should be interpreted in their ordinary sense, except when it is shown that they have been used in a special or technical sense. The ordinary sense of "income" is what comes in, that is, what is actually received by an assessee. There is nothing in the Act to show that this ordinary meaning is not attached to the word. "Income" is not actually defined in the Act, but in Section 2 (15) "Total income" is stated to mean the "total amount of income, profits and gains from all sources to which this Act applies computed in the manner laid down in Section 16". There is nothing in this definition or in Section 16 which would imply that the "total income" was to include an amount which had been decreed but which had not been received. Accordingly our finding is on the first question in the negative, that the unrealized decree is not taxable income for the purpose of income tax; and our answer on the second question is that the assessee was correct in stating that the books were kept simply for the purpose of ascertaining his financial state. Accordingly we direct this reference be returned to the Commissioner and we allow to Mr. Verma a fee of Rs. 150, and the amount which has been certified for the assessee will be allowed as costs against the Department.

Reference answered accordingly.

[IN THE BOMBAY HIGH COURT.]

COMMISSIONER OF INCOME TAX, BOMBAY

v.

D. N. MEHTA.

Beaumont, C. J., and Sen, J.

August 22, 1934.

INCOME TAX—DEATH OF ASSESSEE—ASSESSMEMT OF ESTATE—SECTION 24-B, WHETHER RETROSPECTIVE—'ESCAPE FROM ASSESSMENT,' AND 'NON-ASSESSMENT' DISTINGUISHED - REFERENCE—POWER OF HIGH COURT TO RE-FRAME QUESTION—INCOME TAX ACT (XI OF 1922), SECTIONS 24-B, 34 AND 66 (5).

Section 24-B of the Income Tax Act (which was enacted on the 11th September, 1933, and which provides that where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge, the tax assessed as payable by such person or any tax which would have been payable by him under the Act if he had not died) is not retrospective in its operation and does not apply to cases where the death took place before midnight on the 12th September, 1933.

Where a person on whom a notice had been served under Section 22 (2) died and the proceedings were dropped but subsequently, after the enactment of Section 24-B, she was assessed under the new section: Held, that it was a case of non-assessment, not of income escaping assessment, and Section 34 had therefore no application.

The principle which must always be applied in construing a taxing Act is that the Government must show that the tax sought to be recovered has been imposed in language which admits of no doubt.

Per SEN, J.—*The High Court has power under Section 66 (5) to amend the question referred by the Commissioner and after raising the real question to answer it.*

Cases referred to:

ATHLUMNE, *In re* [1898] (2 Q. B. 547; 67 L. J. Q. B. 935; 79 L. T. 303).

COMMISSIONER OF INCOME TAX *v* NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA [1931] (I.L.R. 55 Bom. 637; 184 I.C. 555; A.I.R. 1931 Bom. 448.)

COMMISSIONER OF INCOME TAX *v.* REID [1931] (I.L.R. 55 Bom. 312; 133 I.C. 261; A.I.R. 1931 Bom. 333.)

Case stated by the Commissioner of Income Tax, Bombay, under Section 66 (1) of the Indian Income Tax Act. (Civil Ref. No. 5 of 1934).

V. F. Taraporewala and *G. Louis Walker*, for the Commissioner.

K. S. Shavaksha, for the assessee.

Beaumont, C. J.—This is a reference made by the Commissioner of Income Tax on his motion under Section 66 (1), Income Tax Act, 1922, in which he raises two questions, the first one being, in effect, whether Section 24-B, which was added to the Income Tax Act by the Income Tax (Second Amendment) Act of 1933 has retrospective effect so as to apply to the case of a person dying before the Amendment Act was passed, and, secondly, whether, if the Amendment Act has retrospective effect, the Commissioner was justified in taking action against the assessee under Section 34, Income Tax Act.

It was held by this Court in *Commissioner of Income Tax* v. *Reid*, which was decided at the end of the year 1930, that where a person dies after the commencement of the financial year, but before his income has been assessed for the purpose of income tax, his estate is not liable to pay the tax. The amendment Act was passed on 11th September, 1933, no doubt, with a view to removing the difficulties pointed out in that case. In the present case the only material facts are that on 20th April, 1932, a notice was served on Bai Avabai N. Metha under Section 22 (2), Income Tax Act, requiring her to make a return in respect of her income for the year 1932-33. She died on 6th May, 1932, before any return had been made, and the question which arises is whether her estate is liable for the tax in respect of the year 1932-33 under the provisions of the Amendment Act, she having died before the Act was passed. Section 11 of the Amendment Act provides that after Section 24 of the principal Act, the " following sections shall be inserted, namely :" Of the sections so inserted, Section 24-B is the material one for the present purpose. That provides in sub-Section (1) that

" Where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge, the tax assessed as payable by such person, or any tax which would have been payable by him under this Act if he had not died."

Then sub-sections (2) and (3) deal with methods of assessment, and for the present purpose it is only necessary to notice that each sub-section commences with the words, "where a person dies." The view taken by the Commissioner is that the principal Act charges tax upon the deceased, and that the Amendment Act merely provides the machinery for making the charge effective, so that once the machinery is there, the tax charged can be collected, whatever the date of the death of the deceased. It is, I think, correct to say that Section 3 of the principal Act charges the tax upon every one coming within

the purview of the Act who was alive at the beginning of the financial year, but in the case of a person dying before assessment, that liability was inchoate only, and crystallized into an enforceable liability for the first time on the passing of the Amendment Act. It is therefore not quite accurate to say that the Amendment Act merely deals with machinery; it does for the first time impose an enforceable liability. The principle which must always be applied in construing a taxing Act is that the Government must show that the tax sought to be recovered has been imposed in language which admits of no reasonable doubt. The opening words of each sub-section to Section 24-B: "Where a person dies", though the use of the present tense is not altogether appropriate on any reading of the Act, seem to me more appropriate to future than to past deaths. If the Legislature had intended the Act to have a retrospective effect, it would have been very easy to have said, "dies whether before or after the passing of this Act." Inconvenience and hardship might be caused by making the tax payable out of an estate which has been distributed on the basis of the then existing law.

The Advocate General has relied on Section 19 of the Amendment Act, which introduces into the principal Act Section 49-B, under which a refund may be claimed by the personal representative of a deceased person who was entitled to such refund, and he suggests that Section 24-B and 49-B should be read together and both given retrospective effect. But even if the latter section applies to a death before the Act came into force, it does not, I think, follow that we should give a similar meaning to Section 24-B. In my opinion the legislature has not shown with sufficient clearness an intention to make Section 24-B retrospective, and I think therefore we must answer the first question in that sense.

The second question in terms does not arise, but as the subject has been discussed in argument, and the Advocate-General has invited the Court to give some guidance upon it to the Commissioner, I would say that, had I been of opinion that Section 24-B was retrospective, I should still have thought that Section 34 had no application in the present case. Sub-Section (1), Section 24-B makes the estate of a deceased person liable for tax under two heads, first, for tax assessed as payable by such person, and secondly, for any tax which would have been payable by him under the Income Tax Act if he had not died. It is not easy to see what tax falls under that second head, because the deceased would not have become liable for tax merely by continuing to live, it would have been necessary to make an assessment of his income. However, whatever the meaning of sub-Section (1) may be, the construction of sub-Sections (2) and (3) to my mind presents no difficulty: sub-Section (2) deals with the case of the deceased person not having been served with a notice under sub-Section (2) of Section 22 or Section 34, as the case may be, the latter section coming into operation where there has been an assessment

upon the deceased under Section 22 (2), but some income has escaped assessment, so that if the deceased had lived he would have received a notice under Section 34. In either of those events the sub-section in effect provides that the Income Tax Officer can serve the appropriate notice on the personal representative, and then proceed to assess the total income of the deceased person as if such representative were the assessee. Then sub-section (3) deals with the case in which a notice has been served on the deceased under sub-Section (2) of Section 22, and the notice has either not been complied with at all, or has been complied with imperfectly.

In either of those events the Income Tax Officer can make an assessment of the total income of the deceased person, and determine the tax payable by him on the basis of such assessment, and he can call for the production of accounts and documents or other evidence from the personal representative. That is the sub-section which would have applied to this case if we had thought that the Act had retrospective effect, because the deceased had been served with a notice under sub-Section (2) of Section 22 and had not compied with it. But if the estate of the deceased is assessed either under sub-Section (2) or sub-Section (3) of Section 24-B I do not myself follow how, at any rate in a normal case, there is any occasion to introduce the provisions of Section 34, because the estate has not escaped assessment, but has been assessed under the Amendment Act. We therefore answer Question No. 1 by declaring that the provisions of Section 24-B introduced by the Amendment Act apply only to cases in which death took place later than midnight on 10th September, 1933. Question No. 2 does not arise. There will be no order as to costs. I have assumed that the reference in the Commissioner's questions to Section 24-B (2) was a slip, and that it was intended to refer to Section 24-B.

SEN, J.—It seems to me that the questions referred to us have not been accurately framed. The provisions of sub-Section (2) of Section 24-B do not appear applicable to the facts of this case. Here admittedly the deceased was served with a notice before she died, and sub-Section (2) provides for the case in which a person dies, before he is served with a notice under sub-Section (2) of Section 22 or Section 34, as the case may be. It is true that after Avabai's death action purporting to be under Section 34 has been taken by the Income Tax Authorities, and that no notice was sent to Avabai under Section 34, but I am of opinion that in the circumstances of this case no action under Section 34 was called for. It therefore seems that this was a case falling under sub-Section (3) of Section 24-B, which provides for the case in which a person dies without having furnished a return which he has been required to furnish under the provisions of sub-Section (2), Section 22. This Court has already held in *Commissioner of Income Tax, Bombay Presidency* v. *National Mutual Life Association of Australasia Ltd.*, that the High Court has power under Section 66 (5) to amend

the question asked by the Commissioner, and after raising the real question to answer it. We accordingly substitute Section 24-B for Section 24-B (2) in the two questions referred to us. Question No. 1 referred to us amounts to this. Does Section 24-B apply to the estate of a person who died prior to the date of the enactment of the said section, *viz.*, 11th September, 1933, in other words, has the new section retrospective operation?

It was held in *Commissioner of Income Tax* v. *Reid*, that if in a case of this nature a charge was created on the income under Section 3 of the Act, the requisite machinery for assessment and collection of the tax charged was wanting in the Act. The new section has apparently been enacted with the object of providing such machinery. It purports to create a liability to pay the charges arising under Section 3. It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, though such an Act is not to be so construed as to furnish a chance of escape and means of evasion: see Maxwell on Interpretation of Statutes, Edn. 7, pp. 246 and 248. The liability to pay created by the new section must be construed as a new "charge upon a subject": and it does not appear to me that the language of Section 24-B is altogether free from ambiguity. All the sub-sections of the said section begin with the words: "Where a person dies." This is capable of meaning, "where a person has died before the date of this amendment or shall die thereafter" as well as "Where a person shall die on this section becoming part of the Act." It was held in *In re Athlumne* (p. 555 of 1828, 2 Q.B.):

"Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

This rule applies to statutes. The new section was inserted into the Act by an amending Act, but I see no reason why the same rule should not apply to an amending Act. It seems to me that if the legislature had intended that the new section should have a retrospective operation, it would have taken care to indicate such intention in express terms. In my view therefore the new section has no retrospective effect, and the answer of question No. 1 will be: the provisions of Section 24-B of the Act apply to those cases in which the person, the liability of whose executor, administrator or other legal representative is in question, has died when Section 24-B came into operation or at any time thereafter.

In view of the above answer, question No. (2) does not arise. But I may point out that the learned Commissioner himself is doubtful whether it can be said that any income escaped assess-

ment within the meaning of Section 34 of the Act. The year concerns the financial year 1932-33 after a notice had been issued to Avabai under Section 22 (2) of the Act calling upon her to submit a return of income showing her income for the preceding year. She died on 6th May, and the administrator of her estate furnished a return of income. In view of the decision in *Commissioner of Income Tax* v. *Reid* the Income Tax Officer dropped further proceedings. In seems to me quite clear that this was not a case of escape from assessment; it was a case of non-assessment, but the assessee or the administrator did nothing to escape assessment.

Reference answered.

[IN THE BOMBAY HIGH COURT]

VADILAL LALLUBHAI MEHTA

v.

COMMISSIONER OF INCOME TAX, BOMBAY.

Beaumont, C. J. and Rangnekar, J.

September 11, 1934.

REFERENCE—POWER OF HIGH COURT TO DIRECT COMMISSIONER TO STATE CASE RAISING QUESTION OF LAW NOT FORMULATED BEFORE HIM—INCOME TAX ACT (XI OF 1922), SECTION 66 (3).

The High Court has power under sub-Section (3) of Section 66 to direct the Commissioner to state a case raising guestions of law which have not been formulated before him. That an assessee requiring the Commissioner to refer questions of law to the Court ought to formulate those questions is a rule of practice based on considerations of convenience and designed to protect the Court from unnecessary applications under sub Section (3); but the Commissioner is not bound to refer only the questions so formulated.

Where the Commissioner refuses to state a case under sub-Section (2) on the ground that no point of law arises, the High Court can under sub-Section (3), if not satisfied with the correctness of the Commissioner's view, require the Commissioner to state the case, that is, the case which he ought to have stated under sub-Section (2) and to refer the case to the Court. If the High Court thinks that questions of law arise it ought to indicate to the Commissioner what those questions are, though the actual framing of the questions rests with the Commissioner. But the High Court under sub-Section (3) is no more limited than was the C omsioner under sub Section (2) to the precise questions formulated by the assessee.

Under Section 66 (2) the assessee is not required to formulate precise questions of law, a task which few laymen are competent to perform. What he has to do within the required time, is to require the Commissioner to refer to the High Court any question of law arising out of the order or decision of the Assistant Commissioner, and then the Commissioner has, within 60 days, to draw up a statement of the case and refer it, with his own opinion thereon, to the High Court.

F. J. Coltman, for the applicant.

Jamshed Kanga and *G. Louis Walker*, for the opponent.

BEAUMONT, C. J.—This is an application made to the Court under sub-section (3) of Section 66 of the Income Tax Act, asking the Court to require the Commissioner to state a case and raise certain points of law. In substance the points of law are said to arise in this way. The assessee was assessed as an individual for the year 1932-33 in respect of his income for the previous year. He alleges that in May 1932 a son was born to him, and he says that having regard to the construction of two documents, the business in respect of which he was assessed was, as between himself and his son, a Hindu joint family business. His contention is that the effect of the two documents is to show that he acquired his share in the business from his own father by a surrender of his interest in certain ancestral immovable property, and that in that way his interest in this business is the interest of a joint Hindu family. The Income Tax Officer in the first instance, and the Assistant Commissioner on appeal, rejected the claim of the assessee, as I understand it, mainly on the ground that they considered these two documents illusory, and that no Hindu joint family existed. That no doubt, is a question of fact, and the only point of law which would arise in connexion with that finding would be whether there was any evidence to justify the finding. Within 60 days after the decision of the Assistant Commissioner an application was made by the assessee to the Commissioner under sub-section (2) of Section 66, requiring him to state certain questions of law, and as not infrequently happens, when these applications are made by laymen, the questions of law formulated had not been carefully considered, and were frankly unintelligible.

The learned Commissioner took the view that no question of law arose, the question at issue being one of fact, and therefore he refused to state a case. The assessee then made an application under sub-section (3) of Section 66 asking us to require the Commissioner to state a case. Now the view taken by this Court more than once and confirmed in the recent decision of *Narayan* v. *Commissioner of Income Tax, Bombay* (1934 I.T.R. 486), is that we have power under sub-section (3) of Section 66, to direct the Commissioner to state a case raising questions of law which have not been formulated before him. The learned Advocate-General has drawn our attention to the fact that that view has not prevailed in some of the other High Courts of India, and he has referred

particularly to a recent decision of a Full Bench of the High Court of Rangoon, *Commissioner of Income Tax, Burma* v. *C. P. L. E. Chettiar Firm* (1934 I.T.R. 201). In that case, SIR ARTHUR PAGE, C. J., who delivered the leading judgment, expressed the view that in a reference under Section 66 (2) the Commissioner has to state sufficient facts to raise the specific question of law which in the view of the assessee arises, that the ambit of Section 66 (3) is not wider than that of Section 66 (2), and that in a reference under Section 66 (3) the Court has seisin only of such questions of law as have been raised before the Commissioner and upon which the Commissioner has expressed his opinion. With great deference to SIR ARTHUR PAGE, I am not prepared to accept that view, which seems to me to restrict the powers of the Court in a manner unauthorized by the Act. Under Section 66 (2), the assessee is not required to formulate precise questions of law, a task which few laymen are competent to perform. What he has to do within the required time, is to require the Commissioner to refer to the High Court any question of law arising out of the order or decision of the Assistant Commissioner, and then the Commissioner has within 60 days, to draw up a statement of the case, and refer it with his own opinion thereon, to the High Court.

In the case of *Narayan* v. *Commissioner of Income Tax, Bombay*, (supra), this Court laid down that an assessee requiring the Commissioner to refer questions of law to the Court ought to formulate those questions. That is a rule of practice based on considerations of convenience, and designed to protect the Court from unnecessary applications under sub-section (3); but the Commissioner is not bound to refer only the questions so formulated. In practice, in a reference under Section 66 (2) the Commissioner seldom refers to the Court questions in the exact terms formulated by the assessee. He raises the questions which in his view arise, and expresses them in his own language. Where the Commissioner refuses to state a case under sub-section (2) on the ground that no point of law arises, the Court under sub-section (3), if not satisfied with the correctness of the Commissioner's view, can require the Commissioner to state "the case," that is, the case which he ought to have stated under sub-section (2), and to refer the case to the Court. If the Court thinks that questions of law arise, it ought to indicate to the Commissioner what those questions are, though the actual framing of the questions rests with the Commissioner. But the Court under sub-section (3) is no more limited than was the Commissioner under sub-section (2) to the precise questions formulated by the assessee. In the present case, if the view of the Rangoon Court is right, we must either refuse to direct the Commissioner to raise questions of law which in our view do arise, or direct the Commissioner to raise the questions which the assessee suggested and which may have meant something to him but are unintelligible to a lawyer. SIR ARTHUR PAGE thinks that on our interpretation of the Act the assessee may raise frivolous questions

before the Commissioner in the hope that the Court will discover some meritorious point of law. The anticipated danger is not, I think, a real one. If frivolous questions are raised they are soon disposed of, and the assessee has to pay the costs. In any case it is better that the Court should occasionally be moved unnecessarily than that persons should be deprived of the right to raise proper points of law through their inability to express them correctly.

Turning now to the circumstances of the present case, I think there are questions of law which arise, and the actual orm of the questions will have to be considered by the Commissioner. But substantially, I think, the questions are, first of all, whether on the true construction of these two documents which are dated 31st August, 1928, and 28th March, 1929, the assessee's share in the partnership firm, C. Doctor & Co., was an undivided Hindu family estate as between himself and his son in which the son acquired an interest at birth, and if so, whether there was any evidence to justify the Assistant Commissioner in coming to the conclusion that those two documents were illusory and should not be given effect to according to their terms. Then, if these questions were answered in the affirmative, there would be a third question, which is an important question of general law under the Income Tax Act, whether the birth of the son in May 1932, affected in any and what way the assessment to which the assessee was liable under the Income Tax Act in respect of the profits of the business. I do not suggest that those questions are in the form in which they ought to be raised, but that is a sufficient indication to the Commissioner of the points of law which, we think, arise, and which we direct him to state in a case to be referred. Costs to be costs in the reference.

RANGNEKAR, J.—I agree and have nothing to add.

Order accordingly.

[IN THE ALLAHABAD HIGH COURT.]

COMMISSIONER OF INCOME TAX, U. P.

v.

MAHARAJ KUMAR OF VIZIANAGARAM.

Sulaiman, C. J., and Bennet, J.

January 10, 1935.

INCOME TAX—APPEALS—JUDGMENT OF HIGH COURT ON REFERENCE UNDER SECTION 66—APPEAL TO PRIVY COUNCIL—WHEN LIES—INCOME TAX ACT (XI OF 1922), SECTION 66-A.

No appeal lies to the Privy Council from a judgment of the High Court delivered on a reference made under Section 66 of the

Income Tax Act unless the case is certified by the High Court as being fit for appeal. Sub-Section (3) of Section 66-A of the Act obviously deals with the procedure to be applied to appeals where such an appeal lies under the preceding sub-Section (2).

Their Lordships certified that the case of Maharaja Kumar of Vizianagaram [1934 I.T.R. 186] was a fit one for appeal to the Privy Council as it involved the important question whether maintenance allowance received by the junior member of an impartible estate is received by him as a member of a Hindu undivided family.

Cases referred to:

BAIJNATH PRASAD SINGH v. TEJ BALI SINGH (I. L. R. 43 All. 228.)

COMMISSIONER OF INCOME TAX, MADRAS v. SRI RAJA VYRICHERLA NARAYANA GAJAPATHI RAJU BAHADUR GARU, ZAMINDAR OF CHEMUDU (I.L.R. 57 Mad. 1023; 1934 I.T.R. 288.)

KONAMMAL v. ANNADANA (I.L.R. 51 Mad. 189.)

KRISHAN KISHORE v. COMMISSIONER OF INCOME TAX (I.L.R. 14 Lah. 255; 1933 I.T.R. 143.)

RAJA YARLAGADDA MALLIKARJUNA PRASAD NAYUDU v. RAJA YARLAGADDA DURGA PRASAD NAYUDU (I.L.R. 24 Mad. 147.)

RAMA RAO v. RAJAH OF PITTAPUR (I.L.R. 41 Mad. 778.)

SHIBA PRASAD SINGH v. PRAYAG KUMARI DEBEE (I.L.R. 59 Cal. 1399.)

Application for leave to appeal to His Majesty in Council.

K. Verma, for the applicant.

Sir Tej Bahadur Sapru and *Ajudhiya Nath*, for the opposite party.

The judgment of the Court was delivered by

SULAIMAN, C.J.—This is an application for leave to appeal to His Majesty in Council in an income tax matter. The value of the subject-matter in dispute is well over Rs. 10,000 and the opinion of the Income Tax Commissioner has not been accepted by the High Court on reference made to it.

The learned advocate for the Income Tax Commissioner contends before us that he is, as of right, entitled to appeal to His Majesty in Council under Section 66-A, sub-section (3), of the Indian Income Tax Act (Act XI of 1922). In our opinion this contention is not well-founded. The right of appeal is conferred

only by sub-Section (2) which provides that an appeal shall lie to His Majesty in Council in any case which the High Court certifies to be a fit one for appeal. This sub-section does not go on to say, as is provided in Section 109 (*a*) and (*b*), that an appeal shall lie from any decree or final order passed by the High Court in the exercise of its final appellate or original civil jurisdiction. It follows that the right of appeal is confined to only such cases as are certified to be fit by the High Court.

Sub-Section (3) is quite different and lays down that the provisions of the Civil Procedure Code relating to appeals shall apply in the case of *appeals* under this section in the same manner as they apply in the case of appeals from decrees. That obviously deals with the procedure to be applied to appeals where such an appeal lies under the preceding sub-Section (2). We accordingly hold that no appeal would lie unless the case can be certified as being fit for appeal to His Majesty in Council.

The assessee is a younger brother of the Maharaja of Vizianagaram, who holds an impartible Raj. Under certain deeds a monthly allowance of Rs. 10,000 is paid by the Raja to the younger brother, and it is this monthly allowance which is sought to be taxed by the Income Tax Officer. Under Section 12 of the Income Tax Act, all incomes are taxable unless otherwise exempted. The assessee claims exemption under Section 14 (1), under which any sum which is received by a member of a Hindu undivided family is exempted. The question in this case, therefore, was whether this income is a sum received by the younger brother " as a member of the Hindu undivided family." The Bench, differing from the view expressed by the Income Tax Officer, came to the conclusion that the monthly allowance was such an income. This view has also been followed by the Madras High Court in the case of the *Commissioner of Income Tax, Madras* v. *Sri Raja Vyricherla Narayana Gajapathi Raju Bahadur Garu, Zamindar of Chemudu.* A similar view has been recently expressed by the Lahore High Court in the case of *Krishan Kishore* v. *Commissioner of Income Tax.* These cases have relied strongly on the observations of their Lordships of the Privy Council in the case of *Raja Yarlagadda Mallikarjuna Prasad Nayudu* v. *Raja Yarlagadda Durga Prasad Naidu, Baijnath Prasad Singh* v. *Tej Bali Singh* and *Konammal* v. *Annadana.* The learned counsel for the assessee urges before us that the allowance is received by the younger brother as a member of the undivided family. On the other hand, the learned counsel for the applicant relies on the second Pittapur case of *Rama Rao* v. *Rajah of Pittapur* and a more recent case of *Shiba Prasad Singh* v. *Prayag Kumari Debee* and contends that the right to maintenance is based on custom or grant and not co-parcenary interest.

The main question in the case is whether the income received by the younger brother is income received by him in his capacity of a member of an undivided Hindu family or whether it is received

by him by virtue of some other right. The question is of some general importance, and, in our opinion, requires an authoritative pronouncement. The cases cited on behalf of the respondent are cases not dealing directly with the right to claim maintenance, but mostly with a right of succession to an impartible estate, whereas the second Pittapur case was a case relating to maintenance, but certain observations made in it have been subsequently explained away by their Lordships of the Privy Council. The last mentioned case of *Shiba Prasad Singh* was also a case of succession, although the rights of co-parceners in an impartible estate were discussed at page 1413 (of 59 Cal.).

The question whether the income received as maintenance allowance is taxable or not has been the subject of decision in India, but has not so far been considered by their Lordships of the Privy Council. As it is an important matter affecting public revenue and is a question which might frequently arise, we think that this case is a fit one for appeal to His Majesty in Council under Section 66-A, sub-section (2). We certify accordingly.

Leave granted.

[IN THE RANGOON HIGH COURT.]

COMMISSIONER OF INCOME TAX, BURMA

v.

V. S. U. R. FIRM, RANGOON.

Page, C.J., Mya Bu and Baguley, JJ.

January 7, 1935.

INCOME TAX—FRESH PROMISSORY NOTE ISSUED BY DEBTOR FOR SUM DUE UNDER OLD NOTE AND INTEREST THEREON—CREDITOR TREATING INTEREST UNDER OLD NOTE AS RECEIVED AND MAKING CORRESPONDING ENTRIES IN ACCOUNTS—ASSESSMENT OF SUCH INTEREST—LEGALITY—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 13.

Where the assessee had elected to treat the interest due under the original loans as having been received and paid on the execution and delivery of fresh promissory notes by the debtor and the interest was entered as having been received both in the interest account and in the personal accounts of the respective debtors; and the assessees accepted the obligations of the debtors under the fresh promissory notes in substitution for the old debts and the interest due thereon, and in past years did not object to interest accruing in this manner being assessed to income tax : Held, *that it cannot be said that in these circumstances there were no materials before the income tax officer which would justify him in concluding that these sums represented interest liable to assessment.*

In such cases if the assessees want to prevent assessment of such interest they should so adjust their accounts as to make it clear that the fresh promissory note is not taken as effecting payment of the interest due under the old loan.

Cases referred to:

COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA *v.* MAHARAJADHIRAJ OF DHARBHANGA [1933] (1933 I.T.R. 94 ; 60 I.A. 146 ; 12 Pat. 318 ; 35 Bom. L.R. 731 ; 142 I.C. 437 ; 37 C.W.N. 598 ; 64 M.L.J. 612.)

COMMISSIONER OF INCOME TAX, BURMA *v.* P. L. S. M. FIRM [1934] (12 Rang. 483 ; 151 I.C. 907 ; 1934 I.T.R. 417.)

GRESHAM LIFE ASSURANCE SOCIETY *v.* BISHOP [1902] (1902 A.C. 287 ; 71 L.J.K.B. 618 ; 18 T.L.R. 626.)

MIAN FEROZ SHAH *v.* COMMISSIONER OF INCOME TAX, PUNJAB [1933] (60 I.A. 325 ; I.L.R. 14 Lah. 682 ; 1933 I.T.R. 219 ; 144 I.C. 685.)

RAGHUNANDAN PRASAD SINGH *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA [1933] (60 I.A. 133 ; I.L.R. 12 Pat. 305 ; 1933 I.T.R. 113 ; 142 I.C. 446 ; A.I.R. 1933 P.C. 101.)

Civil Ref. No. 8 of 1934. Case stated by the Commissioner of Income Tax, Burma, under Section 66 (1) of the Indian Income Tax Act.

A. Eggar, for the Commissioner of Income Tax.

K. C. Bose, for the assessees.

PAGE, C. J.—This case raises an interesting question, but when the facts are understood, in my opinion, it presents no difficulty. The question propounded is:

" Whether there was material on which the income-tax officer could conclude that the assessees' method of accounting was the mercantile or accrued method in respect of the sum of Rs. 23,373 interest from non-Chettyar debtors shown in the assessees' accounts as received, and taxed in the assessment."

Now, in *Mian Feroz Shah* v. *Commissioner of Income Tax, Punjab* (at p. 692), LORD BLANESBURGH, delivering the judgment of the Judicial Committee, observed:

" Too much emphasis has, they think, throughout the case been attached to the use by the Income-tax Officer and the Assistant Commissioner of the term 'mercantile system.' The finding of both, in its essential substance, was that the appellant's system of accounting, by whatever name called, required the inclusion in his

accounts of 1926-27 of the Rs. 90,618 referred to and the only question open to judicial determination is whether there was any evidence before these officers upon which they might so find."

These observations apply with equal force to the present case, and the real question that falls for determination is:

"Whether there were materials before the income-tax officer upon which he could find that the sum of Rs. 23,373 was interest upon loans that had accrued to the assessees in the accounting year, and as such was assessable to income-tax for the year 1933-1934."

The material facts are set out in the revised case stated by the Commissioner of Income Tax as follows:

"The assessees' actual method of accounting for transactions with non-Chettiars is as follows. So long as the original pro-note or document is in force only cash receipts from the debtor are shown in the accounts; but when this pro-note or document is cancelled and a fresh one executed for the amount of the principal of the loan and the interest accrued on it, the principal and the interest are shown in the accounts as paid by the debtor. And it is only logical that the interest should be shown as paid by him since it now ranks as principal earning interest, whereas the original pro-note only bore simple not compound interest. In respect therefore of loans to non-Chettyars, for which fresh pro-notes or documents are taken, the assessees abandon the cash method and follow the mercantile method of accounting. For many years all Chettyars have been assessed without question on these sums of interest included in their pro-notes or document, and shown in their accounts as received. This practice was according to the provisions of Section 13 as understood by this department. Accordingly when the income-tax officer came to make the assessees' assessment for 1933-1934, and found that they had omitted to include in their return Rs. 23,373, which represented interest for which fresh pro-notes had been taken from non-Chettyar debtors and which was shown in their accounts as received, he included the amount in the assessment. His order was upheld on appeal."

The income-tax officer in his assessment order stated;

"In the present case, however, the assessees, according to the custom of the Chettyar community to which he belongs, has always been treating interest included in the fresh pro-note or mortgage bond taken in a settlement of account to cover outstanding principal and interest as realised, and there has been no objection thereto for the last so many years. Further, the amount is shown in the assessee's books as interest realized both in the interest account and in the accounts of the debtors. This method of accounting has been regularly employed by the assessee as well

as other members of his community and under Section 13, I am bound to compute income, profits and gains in accordance with the method of accounting regularly employed by the assessee, and to allow the assessee to exclude the sum of Rs. 23,373-9-0 would be allowing him to change the method of accounting hitherto adopted and thereby not properly deduce the income, profits and gains therefrom. It is also to be noted that the debtors in giving fresh pro-notes for the principal and interest already due have capitalised the amount due to the assessee and thereby undertaken to pay interest on the capitalized amounts and that a fresh contract has been entered in place of the old."

The case for the Crown is that the assessees, in order to postpone payment of income tax until a reduction is made in the rate at which the tax is levied, are wrongfully claiming that this sum of Rs. 23,373 is not income that accrued during the accounting year but represents unpaid interest due to them for the re-payment of which they have received fresh promissory notes from their debtors as security. Now, it is well settled that a debt may be repaid in kind as well as in bullion: *Gresham Life Assurance Society* v. *Bishop*; *Raghunandan Prasad Singh* v. *Commissioner of Income Tax, Bihar and Orissa*, and *Commissioner of Income Tax, Bihar and Orissa* v. *Maharajadhiraj of Darbanga*. In *Gresham Life Assurance Society* v. *Bishop*, LORD LINDLEY observed:

"My Lords, I agree with the Court of Appeal that a sum of money may be received in more ways than one, *e.g.*, by the transfer of coin or a negotiable instrument or other document which represents and produces coin and is treated as such by businessmen. Even a settlement in account may be equivalent to a receipt of a sum of money although no money may pass; and I am not myself prepared to say that what amongst businessmen is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret. But to constitute a receipt of anything there must be a person to receive and a person from whom he receives, and something received by the former from the latter, and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth."

And in *Commissioner of Income Tax, Burma* v. *P.L.S.M. Firm*, I had occasion to refer to the following observations of LORD MACMILLAN when delivering the judgment of the Board in *Commissioner of Income Tax, Bihar and Orissa* v. *Maharajadhiraj of Darbanga*:

"What the officer is directed to compute is not the assessees' receipts but the assessees' income, and *in dubio* what the assessee himself chooses to treat as income may well be taken to be income and to arise when he so chooses to treat it."

and I added:

"although book entries purporting to relate to the receipt of income are not necessarily conclusive as to the quantum of the income to which they purport to refer, for the real income, profits and gains that have accrued during each accounting year are in every case to be determined by the income tax officer as a matter of fact."

In the present case the assessees have elected to treat the interest due under the original loans as having been received and paid on the execution and delivery of the fresh promissory notes by the debtors, and the interest is entered as having been received both in the interest account and in the personal accounts of the respective debtors, and the creditors accepting the obligations of the debtors under the fresh promissory notes in substitution for the old debts and the interest due thereon, and in past years being content that the interest accruing in this manner should be assessed to income tax. In these circumstances I am unable to hold that there were no materials before the income tax officer which would justify him in concluding that these sums, amounting in all to Rs. 23,373, represented interest liable to assessment in the year 1933-1934.

The assessees rely upon two judgments recently delivered by the Judicial Committee in *Raghunandan Prasad Singh* v. *Commissioner of Income Tax, Bihar and Orissa* and *Commissioner of Income Tax, Bihar and Orissa* v. *Maharajadhiraj of Darbanga*, but in my opinion, both these cases, are clearly distinguishable, and afford no assistance to the assessees. In *Raghunandan Prasad Singh* v. *Commissioner of Income Tax, Bihar and Orissa*, the assessees kept their accounts on a cash basis and did not regard the interest under the old mortgage as having been liquidated by the execution and delivery to them of the new mortgage, and further, in their books of account the assessees in that case did not treat the interest under the old loan as having been received or paid. In *Commissioner of Income Tax, Bihar and Orissa* v. *Maharajadhiraj of Darbanga*:

"There was an arrangement affecting the whole indebtedness whereby certain assets were accepted in part satisfaction and promissory notes were taken for the balance;"

there was no continuous or open account, and in that case the general rule therefore prevailed that the giving of the promissory notes did not amount to payment, the promissory notes being merely conditional payment of the debts. In the present case however, in my opinion, there is material to justify the conclusion that the assessees regarded the delivery of the fresh promissory notes as amounting to a liquidation of the assessee's claim for interest, and the sum of Rs. 23,373 was treated by the assessees both in the interest account book and the books relating to the

account of the respective debtors as being interest that had been received by the assessees from their debtors. The remedy for the difficulty in which the assessees find themselves in the present case lies with the assessees themselves: for I see no reason why in the future they should not so adjust their accounts as to make it clear that the acceptance of a fresh promissory note is not taken as effecting payment of the interest due under the old loan.

In the circumstances obtaining in the present case, however, I would answer the question as amended in the affirmative. The assessees will pay the costs of the Commissioner's Advocate's fee, 10 gold mohurs.

MYA BU, J.—I concur.

BAGULEY, J.—I agree.

Question answered.

[IN THE CALCUTTA HIGH COURT.]

In re SIR DAVID YULE'S ESTATE.

Buckland, Costello and Panckridge, JJ.

March 13, 1934.

INCOME TAX—'INCOME'—DISTRIBUTION OF ACCUMULATED PROFITS OF COMPANY AS DEBENTURES—DEBENTURES, WHETHER ASSESSABLE AS INCOME—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 4.

The trustees of the estate of Sir David Yule held all the share capital in certain companies and part of the share capital in certain other companies. They had to meet heavy outgoings for duties and devised a scheme for making the accumulated profits available for meeting such charges without rendering themselves liable to income-tax. The accumulated profits of the former companies were capitalised and distributed to the shareholders in the form of debentures. In the companies in which third persons had shares, a certain number of preferred shares were issued to the trustees and debentures were issued to the preferred shares alone. The debentures were subsequently redeemed and funds were thus raised. The income-tax authorities levied super-tax on the amount of the debentures in the year in which they were issued. On a reference by the Commissioner:

Held, *that the issue of debentures by the companies did not amount to a distribution of profits and the trustees were not liable to be assessed to income-tax or super-tax under the Indian Income Tax Act in respect of the amount of the debentures issued to them.*

COMMISSIONERS OF INLAND REVENUE *v.* FISHER'S EXECUTORS [1921 A.C. 395; 10 Tax Cas. 302] and COMMISSIONERS OF INLAND REVENUE *v.* BLOTT [1921, 2 A.C. 171] *followed.*

SWAN BREWERY CO. *v.* REX [1914 A.C. 231] *distinguished*

Reference made by the Commissioner of Income Tax, Bengal, under Section 66 (2) of the Indian Income Tax Act (XI of 1922).

The facts are fully stated in the judgment of BUCKLAND, J.

The Advocate-General, for the Crown.

JUDGMENT.

BUCKLAND, J.—This is a reference by the Commissioner of Income Tax under Section 66 (1) of the Indian Income Tax Act, made in the following circumstances:

Sir David Yule died on the 3rd July, 1928. He left in India an estate of the value of approximately £ 10,000,000. The executors and trustees appointed by the testator by his will are his widow, The Mercantile Bank of India Ltd., Sir Onkarmull Jatia and Radha Krishna Iyer. Probate of the will was granted to the executors other than Radha Krishna Iyer in England on the 28th October, 1928, and in India on the 7th June, 1929. Under the power of appointment contained in the will Lady Yule has appointed her daughter to be a trustee of the will. The present trustees therefore are Lady Yule, Miss Yule, Sir Onkarmull Jatia and the Mercantile Bank of India Ltd.

The testator's estate in India consisted substantially of holdings of shares in a number of companies most of them formed by him between the years 1917 and 1921 as private companies. They appear to have been what is known as investment companies, holding at the time of the testator's death nothing but shares and securities, for a few years before his death the gardens or other properties of the companies had been disposed of. The principal company was the Calcutta Discount Company which acted as agent for most of the other companies and controlled their finances by deposits and advances, but for the purposes of this case no distinction need be made as regards this particular company.

The companies of which there were thirty have been subdivided by the Commissioner in his statement of facts into three groups with the first two of which alone we are concerned. In the first group which comprises six companies all the capital is ordinary share capital wholly held by the Trustees in their own names or through nominees. The second group comprises 14 companies including the Calcutta Discount Co., Ltd. of which the

share capital was held by the Trustees, their nominees, and in addition other companies. The composition of the third group is irrelevant to this case. All the companies had very large accumulations of undistributed profits. The actual figures are immaterial. The trustees had to meet very heavy outgoings for duties payable both in the United Kingdom and in India in relation to the estate of the deceased and it was to provide funds for such duties that a scheme was devised whereby accumulated profits would come into their hands and be available for the purpose of meeting such charges without, it was hoped, their rendering themselves liable to assessment to income tax in respect of such monies as by such means reached them, though a far more simple method of providing such funds, which the testator himself by his will suggested, *viz.*, to wind up voluntarily one or more of the companies, was open to them.

The proposal was to capitalise the companies' reserves and make a distribution to the shareholders in the form of debentures on redemption of which the funds required would be available. In the case of companies in the first group in which the whole of the shares were held by the trustees or in the names of their individual nominees no difficulty was experienced involving any preliminary step, but in the case of companies in the second group, as shares also stood in the names of other companies, these were regarded as not being capable of being treated as nominees of the trustees, and the procedure adopted was to issue a nominal amount of preferred ordinary shares to the trustees under a power in the articles of association, and none to the other shareholders, and to issue to the trustees debentures upon these preferred ordinary shares alone, none being issued to the companies as ordinary shareholders. Taking the case of the Calcutta Discount Co., Ltd., as an instance, on the 22nd January, 1930, a resolution which had been passed at an Extraordinary General Meeting on the 3rd January was confirmed as a special resolution and it was resolved that the capital of the company be increased by the creation of 725 preferred ordinary shares of Rs. 100 each and the same be issued to such persons as the Secretaries might think fit. At the same meeting new articles of association were adopted by special resolution and among other articles it was provided by Article 126 that "the company in general meeting may at any time and from time to time pass a resolution that any sum not required for the payment or provision of any fixed preferential dividend and (*a*) for the time being standing to the credit of any reserve fund or reserve account of the company, including premiums received on the issue of any shares, debentures or debenture stock of the company or (*b*) being undivided net profit, in the hands of the company, be capitalised, and that such sum be set free for distribution, and be appropriated as capital to and amongst the Preferred Ordinary Shareholders and Ordinary Shareholders respectively in the proportions in which they would have been entitled thereto if

the same had been surplus distributable profits, and such resolution shall be effective etc." A return of allotments made on the 11th February, 1928, pursuant to Section 104 of the Indian Companies Act shows that of these 725 shares 25 were allotted to Miss. Yule, 71 to Lady Yule, and 629 to the Mercantile Bank of India Ltd., Lady Yule and Sir Onkarmull Jatia. On the 24th March, 1931, at an extraordinary meeting of the shareholders the following resolution was passed: "That it is desirable to capitalise a sum of Rs. 1,45,00,000 being part of the amount standing to the credit of the Reserve Fund and accordingly that a special capital bonus of Rs. 1,45,00,000 free of income tax be declared and such capital bonus be applied on behalf of the persons who on the 24th day of March, 1931, were the holders of the 725 issued preferred Ordinary Shares of the company in payment in full for Rs. 1,45,00,000 of debentures of the company carrying interest at 3 per cent. per annum from the 1st day of January, 1931 (and to be charged upon the whole undertaking of the company.)" By a further resolution the Secretaries were empowered to carry out what had been so decided as to the issue of debentures and a minute of the Secretaries dated the 25th March, 1931, shows that effect was given to the resolution of the company.

In the case of companies falling within the first group it appears that a resolution was passed similar to that passed on the 24th March, 1931, by the shareholders of the Calcutta Discount Co., Ltd., and that similarly debentures were subsequently issued to the Trustees.

That is as far as I need go for, though the debentures have been redeemed, the assessment with which this case is concerned is that of the year of issue and the Commissioner states that the assessment was "begun mainly *ex cautela* and to ensure the transactions being brought into consideration as a whole without leaving a loophole for evasion between the two parts of the whole transaction."

On the 5th May, 1933, the Income Tax Officer assessed the assessees to super tax and surcharge on the total amount of the debentures at Rs. 2,42,88,359-6. Against this assessment assessees filed an appeal to the Assistant Commissioner of Income Tax on the 4th September, 1933, and in the grounds of appeal is to be found a complete list of the companies in which debentures were issued to the trustees and of their nominal value. That appeal has not yet been disposed of and during its pendency the Commissioner of Income Tax under Section 66 (1) of the Act has on his own motion drawn up a statement of the case and referred to this Court with his own opinion thereon the following questions :—

First question: —The assessee being in his own name and through nominees the holder (*a*) of the whole of the share capital of companies as specified in this case, and (*b*) together with two Trustees in their individual capacity of the whole of the share

capital of one company as specified: these companies being investment companies of the nature described in the case: and the said companies having issued to the assessee by way of bonus, debentures which have subsequently been paid off through the transactions specified in the case:...........(quaere) was there by these transactions any income, profits or gains which accrued or arose to or were received by the assessee within the meaning of Section 4 of the Act?

Second question:—If any such income did arise, when did it so arise:

Third question:—If any such income did arise, was its quantum an amount corresponding (*a*) to full amount of the debentures or (*b*) to such part only as derived from the received and accumulated revenue profits of the companies,and excluding such part as derived from appreciated valuations of the companies' investment holdings?

Fourth question:—In the latter alternative, on what principles are the respective quanta to be accounted and ascertained?

At the hearing the learned Advocate-General for the Crown has invited us, even should our reply to the first question be adverse to the contentions preferred by him, to leave the third and fourth questions for determination by the Income Tax Department as matters of assessment.

The case for the assessees is based upon the decision of the House of Lords in *Commissioners of Inland Revenue* v. *Fisher's Executors* (1926 A.C. 395; 10 T.C. 302, *et seq*). That was a case in which a limited company having capitalised a part of its undivided profits which it resolved to distribute to its shareholders as a bonus, did so by the issue of debenture stock in satisfaction of such bonus, there being no option on the part of the shareholders to receive such bonus in cash. It was contended by the Crown that by these means there was liberation of assets and a distribution of profits by the company and that the amount received by the shareholders was income in their hands and liable to assessment to super-tax. Their Lordships held that the case was covered by the decision of their Lordships' House in *Commissioners of Inland Revenue* v. *Blott* (1921, 2 A.C. 171) and that the bonus paid to the ordinary shareholders was not a distribution of profits and did not constitute income in their hands for the purpose of super-tax.

I have referred to the authority cited on behalf of the assessees in the fewest words possible for more than one reason. On the facts the case is as near on all fours with the present case as two cases arising out of different sets of circumstances can be and that being so it would be a work of supererogation to state the principles of the decision in the manner that is essential where it is sought

to apply the principles of a decision to a totally different set of circumstances. A further reason is that the learned Advocate-General has in effect conceded that unless he can persuade us to follow *Swan Brewery Co.* v. *Rex* (1914 A.C. 231) which he has sought to do upon the very narrow ground upon which he has invited us to distinguish those two cases, he is precluded from contesting that this case is covered by *Fisher's Case.*

The *Swan Brewery Co.'s Case* was one decided by the Judicial Committee of the Privy Council on appeal from the Supreme Court of Western Australia and the point that arose for determination was whether, a company having accumulated a reserve fund and having resolved to increase and having increased its capital by the issue of new shares equivalent in nominal value to the amount of its reserve fund and allotted such shares to the existing shareholders as fully paid *pro rata* according to their holdings of old shares, such transactions amounted to a declaration of a dividend within the Dividend Duties Act and were liable to duty accordingly. To this the answer by their Lordships of the Judicial Committee was in the affirmative. In *Fisher's Case* that decision was not referred to but in *Blott's Case* all the learned Judges with the exception of LORD SUMNER who had delivered the judgment of the Board in *Swan Brewery Case* appear to have taken the view that the decision in the *Swan Brewery Case* turned upon the meaning of the local statute.

I should not refer to this but for the circumstance that the learned Advocate-General invited us to follow the *Swan Brewery Case* not upon any different principle which he submits it lays down and should be applied but on the grounds that it is a decision of the Judicial Committee of the Privy Council, by the decisions of which tribunal this Court is bound, giving a construction to the words of a statute which construction he submits is applicable to the language of the Indian Income Tax Act.

It appears that the Dividend Duties Act, 1906, of Western Australia defines "dividend" as including "every dividend, profit, advantage or gain intended to be paid or credited..........." The English Income Tax Act, 1918, Section 1, provides that income tax shall be charged, in respcet of "all property, profits or gains etc." and Section 4 which imposes the charge of super-tax provides that "there shall be charged levied and paid..........in respect of the income of any individual etc." By the Indian Statute income tax is charged, on "all income profits and gains etc." and super-tax on the "total income of any individual etc., which shall" for the purpose of super-tax be the total income as assessed for the purpose of income tax (see Sections 3, 4, 16, 55 & 56) with the result that the income, using the word in the popular sense, to be assessed is the same whether it has to be assessed to income tax or super-tax. The learned Advocate-General seeks to draw a distinction between "income" and "all property, profits or gains" in the two sections of

the English Act, the latter form of expression corresponding, he submits, more nearly to the language of the Indian and Australian Statutes, an argument which involves the exclusion from the operation of Section 4 of the English Act of something to which Section 1 would apply. On this ground he seeks to distinguish *Fisher's Case* which was a case of assessment to super-tax and submits that the word "gains" in the Indian Statute has the same effect and intention as the word "advantage" in the Australian Statute. The conflict, if conflict there be, and I may use the word without disrespect, between *Fisher's Case* and the *Swan Brewery Case* was considered by the High Court of Madras in *The Commissioner of Income Tax* v. *Binny & Co.*, (I.L.R. 47 Mad. 837) but the narrow scope of the argument of the learned Advocate-General founded on the *Swan Brewery Case* makes it unnecessary to look further for an answer than that to be found in the observations of the Judicial Committee in *Income tax Commissioner* v. *Shaw Wallace & Co.* (59 I. A. 206) in which SIR GEORGE LOWNDES in delivering the judgment of the Board said: "The object of the Indian Act is to tax "income", a term which it does not define. It is expanded, no doubt, into "income, profits and gains" but the expansion is more a matter of words than of substance." In my judgment the point involved in the first question submitted to us is completely covered by the decision in *Fisher's Case* and the reply should be in the negative. This renders it unnecessary to consider the second question submitted.

It is necessary before concluding this judgment to refer to certain points which the learned Advocate-General desired to urge but which we declined to allow him to do. The learned Advocate-General was prepared to contend that (1) the capitalisation of the undivided profits of the companies was *ultra vires* the companies' memoranda of association; (2) the amended articles of association do not authorise the issue of debentures to the Trustees as ordinary preferred shareholders without offering them to other shareholders and (3) if the companies did not act in accordance with their memoranda and articles of association the transactions are not binding upon the Revenue authorities.

In my judgment it was not open to the Crown so to contend upon the case stated by the Commissioner. The case stated proceeds throughout upon the footing that from the stand-point of company law and the memoranda and articles of association of the companies the transactions were unimpeachable. It may be that all the materials for the decision of further points were available. The Advocate-General said that they were but that does not exclude the possibility of the assessees wishing to adduce further evidence. The case stated contains no findings of fact as a foundation for such contentions nor has the Commissioner expressed any opinion upon the questions of law to which they give rise. If such points are to be submitted for decision they should be properly formulated in the case stated with all necessary

findings of fact and the Commissioner's opinion in order that the assessee may have every reasonable opportunity of meeting them and the Court may know precisely what they are and how they arise. It may be, as the learned Advocate-General was disposed to indicate that the Commissioner with all the legal resources of the Crown at his disposal has not availed himself of them in the preparation of the case or that would have been done and if that is the explanation of the omission I can only observe that the result is unfortunate. In this connexion I would again refer to the procedure followed in the matter of this assessment. The learned Advocate-General has suggested that the appeal to the Assistant Commissioner of Income tax being undisposed of it is still open to that officer in determining the appeal to come to findings of fact adverse to the assessee even to the extent of forming the conclusion that the transactions were all carried out *mala fide*. From the order of the Assistant Commissioner an appeal would lie to the Commissioner whereupon I conceive the provisions of Section 66 (2) and 66 (3) of the Act could, if they were so advised, be invoked by the assessee. I express no opinion on the problems which even a superficial appreciation of these considerations suggest, beyond observing that so far as the questions have been touched upon they appear to be of doubtful value to the Crown, but if the learned Advocate-General has correctly expressed the course which this assessment may yet follow it furnishes an additional reason for declining to entertain points of law which hitherto have not been even remotely suggested. In conclusion, the multiplicity of proceedings which the learned Advocate-General adumbrates cannot be sufficiently deprecated. The competency of the Commissioner to make a reference under Section 66 (1) at the stage at which this reference has been made cannot be questioned, but unless such reference will result in finality, at least as regards the assessment for the year for which the assessment has been made, it would be better deferred until all relevant facts have been ascertained and the case then stated by the Commissioner with such legal assistance as he may deem necessary in a manner setting out all material findings of fact and the several questions of law arising therefrom upon which the opinion of the Court is sought.

My learned brother MR. JUSTICE PANCKRIDGE, who has read this judgment but is unable to be present has asked me to say that he agrees.

COSTELLO, J.—I am of the same opinion.

Reference answered accordingly.

[IN THE LAHORE HIGH COURT.]

AMIR SINGH SHER SINGH

v.

COMMISSIONER OF INCOME TAX

Addison and Din Mahomed, JJ.

February 26, 1935.

RE-ASSESSMENT—'ESCAPED ASSESSMENT,' MEANING OF—WHETHER INCLUDES NON-ASSESSMENT THROUGH ERROR OF JUDGMENT OR WRONG APPLICATION OF ACT—INDIAN INCOME TAX ACT (XI of 1922), SECTION 34.

There is no justification for confining the meaning of the word 'escape' in Section 34 of the Indian Income Tax Act to those cases only which have not come to the notice of the Income Tax Officer at all and excluding those cases where he has applied his mind but on account of an error of judgment has set any part of the income free from assessment. The section is wide enough to include any case of non-assessment, to whatever cause it may be due. The section, therefore, empowers an Income Tax Officer to revise an assessment already made and to assess a sum which had not been assessed by his predecessor on account of a wrong application of the Act.

Cases referred to:

ANGLO-PERSIAN OIL CO. (INDIA), LTD. *In re* [1933] (I.L.R. 60 Cal. 840; 37 C.W.N. 430; 1933 I.T.R. 129).

BURN AND CO., *In re* [1934] (I. L. R. 61 Cal. 132; 1934 I.T.R. 30.)

CHOTELAL, *In re* [1932] (A.I.R. 1932 All. 83).

COMMISSIONER OF INCOME TAX, BURMA *v.* U LU NYU [1932] (I. L. R. 12 Rang. 118; 1933 I. T. R. 373; 146 I. C 306).

COMMISSIONER ON INCOME TAX, BURMA *v.* N. N. BURJORJEE [1931] (I.L.R. 9 Rang. 161).

COMMISSIONER OF INCOME TAX, MADRAS *v.* RAJA OF PARLAKIMEDI [1925] (I.L.R. 49 Mad. 22).

GANESH DAS *v.* COMMISSIONER OF INCOME TAX, PUNJAB [1927] (I.L.R. 8 Lah. 354).

JESA RAM *v.* COMMISSIONER OF INCOME TAX, PUNJAB [1927] (I.L.R. 8 Lah. 347).

KASHI NATH BAGLA, *In re* [1931] (A.I.R. 1932 All. 1).

KISHEN KISHORE *v.* COMMISSIONER OF INCOME TAX, PUNJAB [1933] (I.L.R. 14 Lah. 255; 1933 I.T.R. 143).

RAJENDRANATH MUKHERJEE *v.* COMMISSIONER OF INCOME TAX, BENGAL [1934] (I.L.R. 61 Cal. 285; 1934 I.T.R. 71).

Case stated under Section 66 (2) of the Indian Income Tax Act by the Commissioner of Income Tax, Punjab, (Ref. 4 of 1935).

Harish Chandra, for the assessees.
J.N. Aggarwal and *J. L. Kapur*, for the Commissioner.

JUDGMENT.

This is a reference under Section 66 of the Income Tax Act. The question of law referred for our opinion has been formulated by the Commissioner of Income Tax as follows:

"A business loss of Rs. 55,438 (inclusive of an alleged bad debt deduction Rs. 40, 896) having been determined in an initial assessment and set off therein under Section 24 of the Act against chargeable income, whether in proceedings under Section 34 of the Act, the Income Tax Officer, could validly determine such loss as Rs. 17,126 only (by way of reducing the admissible 'bad debt' deduction to Rs. 2,584) and raise tax upon the balance of income after setting off under Section 24 the reduced loss thus determined?".

Translated in plain language, it means whether an Income Tax Officer can under Section 34 of the Income Tax Act re-open the assessment made by his predecessor, and assess the deduction allowed by the latter to income tax on the ground that they were not permissible under the law. The answer to this question depends upon the interpretation which can be placed upon the words "escaped assessment" used in Section 34. These words have been differently interpreted by different Courts in India and the point, therefore, is not free from difficulty.

In *Kishen Kishore* v. *Commissioner of Income Tax*, a Division Bench of this Court has laid down that the expression 'escaped,' as used in the section, connotes failure by the taxing authority to tax the income owing to accidental or deliberate omission by the assessee to declare it, or to some similar circumstances. In the opinion of the learned Judges, it does not include cases where the income is known or disclosed to the income-tax authority and has been the subject of assessment, which has, however, been set aside by superior authority owing to some mistake in procedure or to the income beeing treated in a wrong category.

In *In re Burn & Company*, a special Bench of the Calcutta High Court has remarked at page 140 of the report as follows:— "The Commissioner seems not to have appreciated that the expression "escaped assessment" is not the same as "escaped from" assessment and that, upon the assumption that there was at one time an assessment of the inccome of Messrs. Burn & Company

at the proper time, it would scarcely be right to say that they escaped assessment in respect of that income at a later period."

In *Rajendranath Mukherji* v. *Commissioner of Income Tax, Bengal*, their Lordships of the Privy Council observed as follows :—

"The appellants, however, submit that this is a case of income escaping assessment within the meaning of Section 34. Assessment, they argue, is a definite act, indeed the most critical act in the process of taxation. If an assessment is not made on income within the tax year, then that income, they submit, has escaped assessment within that year, and can be subsequently assessed only under Section 34 within its time limitation. This involves reading the expression 'has escaped assessment' as equivalent to 'has not been assessed' Their Lordships cannot assent to this reading. It gives too narrow a meantng to the word 'assessment' and too wide a meaning to the word 'escaped.' That the word 'assessment' is not confined in the statute to the definite act of making an order of assessment appears from Section 66 which refers to 'the course of any assessment.' To say that the income of Burn & Company which in January 1928, was returned for assessment and which was accepted as correctly returned, though it was erroneously included in the assessment of Martin & Company has 'escaped' assessment in 1927-28 seems to their Lordships an inadmissible reading."

In *In re Kashi Nath Bagla*, a Division Bench of the Allahabad High Court observed "Accordingly in a proceeding under Section 34 the Income Tax Officer and after him the Assistant Commissioner only deal with extra income which has not been assessed to income tax. No jurisdiction is given to either of these officers by Section 34 to make a new assessment for the purpose of taxing the whole of that assessment under the Income Tax Act.

In *In re Chotey Lal*, this question was again considered by a Division Bench of the Allahabad High Court and the learned Judges remarked: "If we apply the meaning of the words 'assess' and 'assessment' which has been applied to Section 23, we shall find that no portion of the income of L. Chotey Lal has escaped assessment within the meaning of Section 34, Income Tax Act. In other words, it cannot be said that any portion of the income of L. Chotey Lal was not discovered as income liable to be taxed."

In *Jesa Ram* v. *The Commissioner of Income Tax*, as well as in *Ganesh Das* v. *The Commissioner of Income Tax*, Section 34 was referred to but not exhaustively discussed. In the latter judgment, the Commissioner stated that Section 34 applied only to income profits or gains that have escaped assessment and in this case the income to be assessed did not escape assessment inthe year in question. All that had occurred was that it had been assessed in the hands of an assessee to whom it was subsequently found not to belong. The learned Judges observed that this argument did not

appear to them to be sound and that the income had escaped assessment so far as the person who received it was concerned. They further remarked that whatever may be the reason for the Income Tax Officer's failure to assess the income within the period prescribed by law, he was not competent to assess it after the expiration of that period of limitation. These remarks would evidently show that the learned Judges were not prepared to restrict the meaning that would be placed on the word 'escaped'.

In *The Commissioner of Income Tax* v. *U Lu Nyu*, a Special Bench of the Rangoon High Court considered the applicability of Section 34 and although almost all authorities relating to the point in dispute were cited before them, the learned Judges without referring to any of these authorities held that the Income Tax Officer had no jurisdiction to revise the assessment for the previous year which was completed and had become final. They also expressed their opinion that the assessment which he made was not under Section 34 but was an attempt by one Income Tax Officer to go behind and revise the assessment made by the Income Tax Officer in the previous year merely because he disagreed with his predecessor as to the amount of the assessable income which, in their opinion he had no jurisdiction to do. As against this we find that the same question came before a Special Bench of that Court in *Commissioner of Income Tax, Burma* v. *N.N. Burjorjee* and there it was laid down that Section 34 was applicable to cases in which either no assessment at all had been made upon the person who received the income, profits or gains liable to assessment, or where an assessment had been made in the course of the year, but some portion of the income, profits or gains of such assessee for some reason or other had not been included in the order of assessment. It was expressly remarked in that judgment that such income was income which had 'escaped assessment' in the year, and fell within the ambit of Section 34 of the Act. It may be mentioned here that two out of the three judges composing the Special Bench on both these occasions were the same.

In *In re The Anglo Persian Oil Company* (*India*) *Limited*, a Division Bench of the Calcutta High Court composed of RANKIN, C.J., and BUCKLAND, J., had an opportunity to consider this matter. RANKIN, C. J., who delivered the judgment, observed as follows:

"I see no way of holding that Section 34 is inapplicable to put right an assessment, by which a deduction has been improperly allowed. Such a case is, in my opinion, a case of income escaping assessment not the whole income of the assessee but a part of it escaping assessment, and there is nothing in Section 34, which limits it to cases of non-disclosure by the assessee, or discovery of new matter by the income-tax authorities or inadvertence as distinguished from erroneous deliberations on the part of these authorities."

This judgment was based on *The Commissioner of Income Tax* v. *Raja of Parlakimedi*. In that Case SIR MURRAY COUTTS-TROTTER, C.J., in agreement with BEASLEY, J., remarked as below:—

"It is said that 'escaped assessment' must mean not that the question has been considered and decided in favour of the assessee, but that the Income Tax Officer has omitted to consider the question at all or was unaware of the existence of the property now sought to be taxed and therefore passed it over and that it does not apply to cases where the Income Tax Officer on consideration came to the conclusion, *ex hypothesi* an erroneous conclusion, that the property in question was not assessable. It seems to me that that construction is forbidden by the alternative case put in the section:

'Where the income.........................has been assessed at too low a rate.'

That cannot be a matter of mere inadvertence, that must refer to a deliberate assessment made by the income tax officer in the preceding year with knowledge of the facts and circumstances. It appears to me that a similar view must be taken of the previous words 'escaped assessment' and that it applies to cases where the income tax officer has deliberately adopted an erroneous construction of the Act just as much as to a case where the officer has not considered the matter at all, but simply omitted the assessable property from his view and from his assessment."

We also find that when in 1926 the question of the interpretation of Section 34 came before a Special Bench of the same High Court composed of SIR MURRAY COUTTS-TROTTER, C.J., KRISHNAN and BEASLEY, JJ., two of whom, as stated above, were responsible for the decision reported in *The Commissioner of Income Tax* v. *Raja of Parlakimedi*, the learned Judges decided that an assessment already made under Section 23 (4) could be reopened by the Income Tax Officer under Section 34 on the sole ground that there had been an under assessment in respect of particular source of income (*see* 2 Income Tax Cases 173). It may be mentioned that in this case the judgment recorded by the learned Judges does not discuss the question involved or the authorities applicable thereto, but merely records the opinion of the learned Judges on the facts stated by the Commissioner.

In this state of affairs, we must fall back upon the language of the section itself and try to place upon the plain words of the section the interpretation which they can reasonably admit. The word "escape", as defined in Murray's Dictionary means:

(1) to get off safely when pursued or imperilled; to avoid capture, punishment or any threatend evil:

(2) to get clear away from (pursuit or a pursuer); to elude (a person's grasp); to succeed in avoiding (anything painful or unwelcome);

(3) to elude (observation, search, etc.); to elude the notice of (a person).

It will appear therefore that this word is susceptible of more interpretations than one. It may either connote the idea of elusion or the idea of avoidance without reference to elusion. We have, therefore, to see whether there is anything in the section itself which would help us in determining what it signifies there. Fortunately, the legislature has used some words in the beginning of the section which make our task easy. The words "for any reason" placed before the expression "escaped assessment" clearly indicate that the legislature intended to include all those cases which either resulted from mere inadvertence or from conscious misapprehension of the proper situation. From the perusal of the judgments cited above which restrict the meaning of the word "escape" it appears that the significance of these words has not been duly considered. To us, in the presence of these words, there appears to be no justification for confining the meaning of the word "escape" to those cases only which have not come to the notice of the Income Tax Officer at all and excluding those cases where he has applied his mind but on account of an error of judgment has set any part of the income free from assessment. The idea conveyed by the words "for any reason" is so wide as to make it impossible not to include any case of non-assessment to whichever cause it may be due. We may remark, that the intention of the Legislature was to shape Section 34 on the model of Section 125 of the English Act which was very extensive in its scope and covered all such cases as we propose to do. In respectful agreement therefore with *In re The Anglo Persian Oil Company (India) Ltd.*, we have no hesitation in holding that Section 34 empowers an Income Tax Officer to revise the assessment already made and to assess a sum which has not been assessed by his predecessor on account of the wrong application of the Act. Our answer to the question referred therefore, will be in the affirmative.

Question answered accordingly.

[IN THE ALLAHABAD HIGH COURT.]

GAYAPRASAD AND CHOTEY LAL, *In re.*

NIAMATULLAH and BENNET, JJ.

November 30, 1934.

INCOME TAX—'CASUAL AND NON-RECURRING RECEIPT NOT ARISING OUT OF BUSINESS'—ADVANCING MONEY FOR CONDUCTING LITIGATION IN RETURN FOR SHARE IN PROCEEDS THEREOF—SHARE RECEIVED, WHETHER ASSESSABLE INCOME—'INCOME,' 'BUSINESS,' MEANINGS OF—INCOME TAX ACT (XI OF 1922), SECTIONS 4 (3) (vii) AND 10.

The assessee entered into an agreement with one K undertaking to supply funds to K for prosecuting an appeal. K agreed to repay the assessee the sums advanced by the assessee and also an additional sum of Rs. 21,000 if the appeal was decided in K's favour or the matter was compromised. If K failed, the assessee was to get nothing. K succeeded in the case and the assessee received Rs. 15,000 in full satisfaction under the agreement. The income tax authorities deducted a sum of Rs. 440 on account of interest paid by the assessee and assessed the balance of Rs. 14,560 to income tax. The assessee contended that the amount thus received was not income or profit or gain but a receipt of a casual nature not arising out of business : Held, *that the transaction amounted to a business within the meaning of the Income Tax Act, the income was not of a purely casual nature but represented a return on the money invested by the assessee, and it was rightly assessed to income tax.*

Case referred to:

COMMISSIONER OF INCOME TAX *v.* SHAW WALLACE & Co., [1932] (59 I. A. 206; 136 I. C. 742; 36 C. W. N. 653; 34 Bom. L. R. 1033; 1932 Comp. Cas. 276; 6 I.T.C. 178), *distinguished.*

Case stated by the Commissioner of Income Tax, Central and United Provinces, under Section 66 (2) of the Income Tax Act. (Mis. Case No. 285 of 1934).

STATEMENT OF CASE.

The assessee is a Hindu undivided family styled "Gayaprasad Chhotelal." The family owns some houses and is usually assessed on its income from property alone. It does not regularly carry on any business. But it had entered into a contract, with one Kanhaiyalal Jaju, to prosecute and finance his case pending in the High Court and, in the event of success, was to receive the expenses of the litigation and in addition the sum of Rs. 21,000. It was stipulated that in the event of the obligor (Kanhaiyalal Jaju) losing the case the assessee was to get nothing. Kanhaiyalal Jaju won the case ultimately and in the financial year ending 31st

March, 1932, paid Rs. 15,000 to the assessee as a result of a compromise, out of the sum of Rs. 21,000, in addition to the expenses incurred in the prosecution of the case. After deducting Rs. 440 on account of interest paid by the assessee the Income Tax Officer, Cawnpore, assessed the assessee in the amount of Rs. 14,560. It was contended before the Income Tax Officer that the transaction was a sort of wager and that the amount was not therefore, liable to be assessed. This contention was overruled by the Income Tax Officer on the ground that it, in fact, represented a payment in lieu of the assessee's efforts for and the risk he incurred in investing the money in the prosecution of the case. A copy of the assessment order will be found in Appendix A.

An appeal was launched but was unsuccessful, the Assistant Commisssioner holding that the transaction was an "adventure in the nature of trade, commerce or manufacture" and was therefore, covered by the inclusive definition of the word "business" given in Section 2 (4) of the Income Tax Act and that the income, though casual and non-recurring was not exempt as it did not represent receipts not arising from business. In the event he dismissed the appeal. Appendix B is a copy of the Assistant Commissioner's order.

The assessee has now made a petition under Section 66 of the Income Tax Act praying that the petition may either be allowed and the assessment cancelled or the questions of law arising out of the appellate order referred to the Honourable the High Court for decision. No questions have been formulated by the assessee. The petition is in Appendix C.

In my opinion no question of law arises except the following questions which I am prepared to refer:

(1) Did the sum of Rs. 14,560 assessed by the Income Tax Officer represent income, profits or gains?

(2) If so, did that sum represent a receipt arising from business within the meaning of Clause (*vii*) of sub-Section (3) of Section 4 of the Indian Income Tax Act, 1922, and consequently excluded from the exemption conferred by that clause?

The assessee relies on the decision of their Lordships of the Privy Council in *Commissioner of Income Tax* v. *Messrs. Shaw Wallace & Company* (6 I. T. C. 178) in which it was held that compensation for loss or cessation of business was not taxable. It is in connection with this decision of their Lordships of the Privy Council that the first question which I am referring has to be examined. The argument for the assessee would be that because the transaction is an isolated one the profits from it are not "income". Such a contention would rely upon those words in their Lordships' judgment which are printed at the foot of page 180 of Volume VI, I. T. C., and which begin: "Income, their Lordships think,............" That passage contains part of the argument

that led their Lordships to a certain conclusion in a case entirely different in character from the present case—so different in character, indeed, that I contend that it can be very clearly distinguished.

The ground of distinction which I would draw is that a transaction which is in the nature of business may be a singular transaction by its inherent nature, that is to say, because it cannot be repeated, or by the accident of non-repetition, that is to say, it could be repeated, but it does so happen that it has not been repeated. Where the transaction is singular only by the accident of non-repetition, then if it is a business transaction the doctrine of the exercise of continuous activity, as laid down in the Shaw Wallace decision, does not require to be applied. In other words, the decision in the *Shaw Wallace Case* should, I submit, be held only to have been intended to apply to cases in which the transaction was singular by virtue of its inherent nature. Repetition was impracticable in the *Shaw Wallace Case*, whereas in the present case, the transaction could have been repeated as often as clients could be obtained, and that is a restriction which applies to all classes of business. Had a second client offered on the same terms, there would have been two business transactions of this nature, and it is beyond my capacity to understand how the aggregate profits from two such transactions could not have been held to be income. If, however, such a conclusion could be founded on the *Shaw Wallace Case*, then the question would arise what number of transactions would be required to constitute such continuity of activity as to take the case out of the ruling. It is submitted that the solution cannot be sought on the lines of mere multiplication and that the proper ground for distinction is whether the singularity of the transaction is inevitable or accidental, and it should be held that the ruling in the *Shaw Wallace Case* only applies where the singularity of the transaction is inevitable.

An additional ground for distinction of the two cases is that the solatium paid to Messrs. Shaw Wallace and Company was not income, profit or gain arising out of a contract, whereas in the present case the amount is the outcome of a contract which turned profitable. It is the produce of a profitable bargain, which under the Indian Law is not illegal, though legality or illegality is irrelevant.

For these reasons I hold that the answer to the first question which I have formulated is in the affirmative.

The second question, therefore, arises. To this question I would, in the first place, answer that the transaction in question, though an isolated one, was not of a casual or non recurring nature, and, in the second place, that even if it were so, it could not be covered by Section 4 (3) (*vii*) of the Act because the sum undoubtedly was a receipt arising from business, and it is only receipts not arising from business or the exercise of a profession,

vocation or occupation which can be covered by that clause. My answer to the second question, therefore, is also in the affirmative. A decision in accordance with my view on the second question would be entirely in keeping with this Honourable Court's previous decision in the case of *Chunni Lal Kalyan Das* which related to the taxation of brokerage earned in an isolated transaction (1 I. T. C. 419-421).

Gopi Nath Kunzru (for whom *Harnandan Prasad*), for the assessee.

K. Verma, for the Crown.

The judgment of the Court was delivered by

NIAMATULLAH, J.—This is a reference by the Commissioner of Income Tax under Section 66 (2). The assessee is a Hindu undivided family, which owns a certain house property which is its principal source of income. In previous years income tax used to be assessed on the income of that property. In the year ending 31st March, 1932 the family was assessed on an income which included a sum of Rs. 15,000 received in a transaction to be presently referred to. The question which arose before the assessing authorities was whether this sum of Rs. 15,000 can be considered to be income, profit, or gain of business within the meaning of the Income Tax Act. The Income Tax Commissioner held that it was income accruing from business and, therefore, taxable. He, however, made a reference under Section 66 (2) on the application of the assessee, and the questions which we are called upon to answer are as follows:—

(1) Did the sum of Rs. 14,560 assessed by the Income Tax Officer represent income, profits or gains?

(2) If so, did that sum represent a receipt arising from business within the meaning of Clause (*vii*) of sub-Section (3) of Section 4 of the Indian Income Tax Act, 1922, and consequently excluded from the exemption conferred by that clause?

It appears that one Kanhaiyalal Jaju was a party to an appeal pending in the High Court. The assessee entered into an agreement with Kanhaiyalal, under which the assessee undertook to supply funds needed for the prosecution of the appeal by Kanhaiyalal who agreed to repay the sums to be advanced to him by the assessee together with an additional sum of Rs. 21,000 in case the appeal was decided in favour of Kanhaiyalal. It seems to be implied that if Kanhaiyalal was unsuccessful, he was not liable to repay any part of the advances made by the assessee, nor would he be liable to pay anything by way of compensation. The agreement was reduced to writing. The assessee, represented by one Chhotelal, executed an instrument stipulating to supply all funds needed by Kanhaiyalal for the prosecution of his appeal and to take formal receipts from the latter. The agreement proceeded to lay down

that, in case the appeal was successful, Kanhaiyalal would pay back all the sums advanced by the assessee together with the sum of Rs. 21,000 and that in case Kanhaiyalal failed to fulfil his undertaking, it would be open to the assessee to institute a suit for recovery of the sums due under the agreement with interest at the rate of 9 per cent. per annum. The agreement further provided that in case any compromise was arrived at between Kanhaiyalal and his adversary, the assessee would be entitled to repayment of the sums advanced by him and also to the sum of Rs. 21,000, referred to above.

The assessee financed the litigation, and Kanhaiyalal won his appeal. Apparently Kanhaiyalal was not willing to pay the sum of Rs. 21,000 in addition to the sums actually advanced. Eventually a compromise was arrived at between the assessee and Kanhaiyalal, under which the latter paid Rs. 15,000 in full satisfaction of the assessee's claim under the agreement referred to above. The Income Tax Department deducted a sum of Rs. 440 on account of interest paid by the assessee, and assessed Rs. 14,560 to income tax. This is the sum which is referred to in question No. 1.

The learned advocate for the assessee has argued that the receipt of Rs. 15,000 by Kanhaiyalal in the circumstances already stated cannot be considered to be income, profit or gain from business within the meaning of Section 4 (3) (*vii*), Income Tax Act. He also contended that it is income of a casual nature and should be deemed to have been exempted by the aforesaid section. Reliance is placed on *Commissioner of Income Tax* v. *Shaw Wallace & Company*, in which their Lordships of the Privy Council made certain observations to the effect that the word "business" connotes continuity and regularity of transactions. In that case Messrs. Shaw Wallace and Co., agents of a certain petroleum company, were paid a large sum of money as compensation for the termination of their agency. The income tax authority treated it as income, profit or gain, and assessed it to tax. The Calcutta High Court held that it could not be considered to be income, gain or profit so as to attract the application of the Income Tax Act. Their Lordships of the Privy Council took the same view, and observed:

"The object of the Indian Act is to tax "income" a term which it does not define. It is expanded, no doubt, into 'income, profits and gains'; but the expansion is more a matter of words than of substance. 'Income' their Lordships think, in this Act, connotes a periodical monetary return 'coming in' with some sort of regularity or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of definite return excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something, which is often

loosely spoken of as 'capital'. But capital, though possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production.

Their Lordships also referred to the phrase "business carried on by him" in Section 10. In the end they held the payment to Messrs. Shaw Wallace and Company as no more than a *solatium*. We are clearly of opinion that the observations of their Lordships of the Privy Council quoted above which are strongly relied on by the assessee, should be taken in conjunction with the facts of that case and we are unable to hold that their Lordships intended to lay down that, unless the source of income is one which yields income periodically and not only once, the income derived from it cannot be assessed to tax. Circumstances are easily conceivable in which there can be no doubt that the receipt of a sum of money is the income, profit or gain from business, and yet it accrued only once. In the case before us there can be little doubt that the assessee embarked upon a transaction of loan in which unusual conditions were stipulated. He agreed to advance such sums as were needed by Kanhaiyalal for the prosecution of his appeal and stipulated for its return together with profits on the sums advanced. The profits were not calculated at a given rate of interest, but in a lump sum. It may be, as the learned advocate for the assessee argues, that there was an element of speculation in the transaction. At the same time, it cannot be gainsaid that the transaction was one of loan from which the lender expected to derive considerable pecuniary profit. The business which yielded profit to the lender commenced from the date of the agreement and continued till the assessee realised the sum of Rs. 15,000 from Kanhaiyalal. There was continuity and regularity in the sense that he advanced sums from time to time, as occasions arose from Kanhaiyalal to borrow, took steps to enforce the agreement against Kanhaiyalal and succeeded so far as to recover Rs. 15,000 out of the Rs. 21,000 agreed to be paid, over and above the sums actually advanced. We are clearly of opinion that the transaction amounted to business within the meaning of the Income Tax Act. We are unable to hold that this income was of a purely casual nature. On the contrary, we think that it represents a return on the money invested by the assessee. To hold otherwise would imply that the income profit or gain, accruing from a single transaction or investment which is not akin to the assessee's trade or avocation is not income, gain or profit from business which in our opinion, is contrary to the plain meaning of the words employed in the Act. That a single transaction or investment may be business cannot admit of doubt. Any receipts exceeding the capital must be treated as profit. It is true that, if Kanhaiyalal had lost the case, the assessee would probably have lost all that he had advanced to him. That, however, is besides the point. The fact remains that he received Rs. 15,000 as a return on the sums which Kanhaiyalal had borrowed.

For the reasons given above we answer both the questions in the affirmative. The assessee shall pay the costs of this reference. We assess the fee of the advocate for the Department at Rs. 150, for which a certificate shall be filed within the time allowed by the rules.

Reference Answered.

[IN THE ALLAHABAD HIGH COURT.]

RAMRATAN DAS AND MADAN GOPAL, *In re.*

Niamatullah and Bennet, JJ.

November 30, 1934.

SUPER TAX—HINDU UNDIVIDED FAMILY OWNING SHARE IN UNREGISTERED FIRM—ASSESSMENT OF FIRM TO SUPER TAX—SUBSEQUENT ASSESSMENT OF PROFITS PAID TO HINDU FAMILY—LEGALITY—PROVISO TO SECTION 55, SCOPE OF—'INDIVIDUAL.' MEANING OF—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 55.

The word 'individual' in the Proviso to Section 55 of the Indian Income Tax Act is used in a wide sense and includes a Hindu undivided family, and a Hindu undivided family having a share in an unregistered firm is not therefore liable to pay super-tax in respect of the amount of the profits of the firm proportionate to its share, where the profits of the firm have been assessed to super-tax.

Case stated by the Commissioner of Income Tax, Central and United Provinces, under Section 66 (3), Income Tax Act (Mis. No. 39 of 1934).

The facts of the case are stated in the following statement of case made by the Commissioner:

" By their order, dated the 25th August, 1933, in Miscellaneous Case No. 380 the Hon'ble the High Court have been pleased under Section 66 (3) of the Income Tax Act to direct the Commissioner to state a case on the following question of law framed by them:

" Whether the applicant is liable to pay super-tax on that part of its income which represents profits received by it from the unregistered firms in its capacity as a partner in the firm, Jai Dayal Madan Gopal."

2. The facts of the case are as follows:

The applicant is a Hindu undivided family carrying on business in the name and style of Messrs. Ram Ratandas Madan Gopal. The family is a partner of a half share in the registered

firm of Jai Dayal Madan Gopal, Nandan Sahu, Benares, the other half being held by another Hindu undivided family known as Jai Dayal Sagarmal, which is an applicant in the connected Misc. Case No. 381. This registered firm was a partner in nine unregistered firms. For the assessment year 1929-30 the total income of the registered firm which was determined (after correction) to be Rs. 1,81,338 consisted entirely of its share of profits of the unregistered firms and included Rs. 1,32,522 on account of its share in two of the firms mentioned above which had been assessed to super-tax. Under Section 55 of the Income tax Act the registered firm as such was not liable to super-tax and no super tax was therefore levied on it. In assessing the applicant to super-tax for that year the Income Tax Officer, Benares, who had jurisdiction to assess it, included its half share in the registered firm amounting to Rs. 90,669 determined its total income at Rs. 98,409 and after allowing a deduction of Rs. 75,000 being a maximum amount not liable to super-tax in the case of a Hindu undivided family, assessed to super-tax on the remaining amount of Rs. 23,409. Subsequently on appeal the amount actually assessed to super-tax was reduced to Rs. 18,087. It was contended before the Income Tax Officer that the applicant's share in the registered firm included profits exceeding Rs. 23,409 which had been assessed to super-tax in the hands of the unregistered firms and that for that reason under the proviso to Section 55 of the Income Tax Act, the applicant was not chargeable with any super-tax."

For the reason that the applicant was not an individual but a Hindu undivided family the Income Tax Officer overruled the contention. A copy of the assessment order will be found in Appendix A. An appeal followed which, so far as the particular contention was concerned, was unsuccessful, the Assistant Commissioner holding further that in the hands of the applicant the income received by the registered firm from the unregistered firms in which it was a partner had ceased to retain the character of that income and that, therefore, also the applicant was not entitled to the benefit of the proviso to Section 55. Appendix B contains a copy of the appellate order. The applicant applied under Section 66 (2) for a reference to the High Court but the Commissioner of the time, being unable to discover any question of law, refused to state a case. Appendix C is a copy of the Commissioner's order. The applicant then moved the Hon'ble the High Court under Section 66 (3) with the result that the Commissioner was directed to state a case on the question enunciated above.

3. The opinion of the Commissioner is as follows:—

" In the case of the registered firm Jai Dayal Madan Gopal mentioned above the Hon'ble the High Court were pleased to hold that the firm in its corporate capacity could not be a partner in other firms, *i.e.*, the nine unregistered firms to which reference

had been made above (vide *Commissioner of Income Tax, United Provinces* v. *Jai Dayal Madan Gopal*, Miscellaneous Case No. 653 of 1931, decided on 22nd April, 1932)*. It follows as a corollary from this decision that the applicant as one of the partners in the registered firm is directly a partner in the unregistered firms in its capacity of a Hindu undivided family, and the question resolves itself into one of the interpretation of the word "individual" occurring in the proviso to Section 55 of the Income Tax Act. Under that proviso "where the profits and gains of an unregistered firm have been assessed to super-tax, super-tax shall not be payable by an individual having a share in the firm in respect of the amount of such profits and gains which is proportionate to his share." The benefit conferred by the proviso is restricted to an "individual" having a share in an unregistered firm. If the word "individual" is held to include a Hindu undivided family, there is admittedly no liability to super-tax in this case. If on the other hand, it is held that the word is used in its connotation as an entity distinct from a Hindu undivided family, a company, etc., there is clearly no exemption from the liability. Under Section 3 and the substantive part of Section 55 of the Income Tax Act the word "individual" is used obviously in its exclusive sense and the Commissioner is unable to see why a different meaning should be attached to it in the proviso. The applicant being a Hindu undivided family, is therefore, it is respectfully submitted, not entitled to the benefit. Had the legislature intended to extend it to a partner other than an "individual" there was no impediment to its using the more extensive word "an assessee" or a "person" instead of the word "individual." The Commissioner is, therefore, of the opinion that the question should be answered in the affirmative."

K. N. Katju and *Harnandan Prasad*, for the assessee.

K. Verma, for the Crown.

The judgment of the Court was delivered by

NIAMATULLAH, J.—This is a reference under Section 66 (3) by the Income Tax Commissioner. There is a connected reference No. 40 of 1934. The assessee in the present case is a joint Hindu family represented by its karta, Lala Ramratan Das. The assessee in the connected case is a joint Hindu family represented by its karta, Lala Jaidayal. The two joint families entered into a partnership having equal shares and became a registered firm styled Jaidayal Madangopal. This registered firm (consisting of the two joint families as partners) became a partner in nine other unregistered firms. On a reference made by the Income Tax Commissioner on a previous occasion it has been held by a Bench of this Court that the registered firm (consisting of the two joint families) could not in law be a partner in the aforesaid nine unregistered firms. The result of this decision was that each of the two joint

* *Vide* 1933 I.T.R. 186.

families was taken to be severally a partner in the nine unregistered firms and not as a component part of the registered firm.

A sum of Rs. 1,81,338 was received by the registered firm as its share of the profits from some of the unregistered firms of which it had become a partner. The share of each of the two joint families in such profit came to Rs. 90,669. This, added to the other income of the joint family represented by L. Ramratan Das, gave a total of Rs. 98,409, on which the Income Tax Department assessed a super-tax after making allowance for Rs. 75,000 up to which a joint Hindu family is exempt from the payment of super-tax. An objection was taken on behalf of L. Ramratan Das to the sum of Rs. 90,669, being included as part of the income of his joint family for the purposes of super-tax on the ground that the same was exempt from payment of super-tax under Section 55, Proviso, Income Tax Act. The objection was overruled. The Income Tax Commissioner was directed by an order of this Court dated 25th August, 1933, to submit a case for the determination of the following question:—

Whether the applicant is liable to pay super-tax on that part of its income which represents profits received by it from the unregistered firms in its capacity as a partner in the firm, Jai Dayal Madan Gopal?

The Income Tax Commissioner has recorded his opinion as regards the proper construction of the word "individual" occurring in the Proviso to Section 55 on which the decision of this case turns. Section 55 runs as follows:

"In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, unregistered firm or other association of individuals, not being a registered firm, an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the Indian Legislature:

Provided that, where the profits and gains of an unregistered firm have been assessed to super-tax, super-tax shall not be payable by an individual having a share in the firm in respect of the amount of such profits and gains which is proportionate to his share."

The learned advocate for the department has strenuously contended that the word "individual" occurring in the Proviso must be assigned the same meaning as it bears in the main section. He points out that the word "individual" has been used in the section as not including a Hindu undivided family which is separately referred to, and contends that the same word occurring in the Proviso must be taken to be used in an exclusive sense. He also argues that the Legislature has not advisedly used in the Proviso the word "person" which includes a Hindu undivided family

[Section 2 (9)]. As against this the learned advocate for the assessee lays stress on the fact that no reason can be suggested why a differential treatment should have been made in case of an individual, implying a man or a woman, and a Hindu undivided family should have been made liable to pay super-tax a second time. The learned advocate for the department suggested that the difference is due to the fact that a Hindu undivided family is exempt from payment of super-tax where its income does not exceed Rs 75,000, while any other person is liable to pay super-tax on the excess over Rs. 30,000.

We have carefully considered the phraseology of Section 55 and its Proviso and the policy underlying the whole Act and are of opinion that the word "individual" has been used in the Proviso in a slightly wider sense than the same word occurring in the section itself. Ordinarily where the same word occurs in two different parts of the same section the same meaning should be assigned to it, but if there is anything in the context to indicate a different meaning or the principle underlying the section makes it more logical to assign a different but legitimate meaning it is permissible to construe the same word occurring in two parts of the same section differently. Section 55 lays down generally that every individual, joint Hindu family, company, unregistered firm (a registered firm is separately provided for) or other association of individuals is liable to pay super-tax in addition to the income-tax payable under the Act. As the section makes, *inter alia*, an unregistered firm liable to super-tax, the Proviso is intended to make it clear that the component parts of such unregistered firm cannot be made to pay super-tax if the firm itself has already paid it. If the contention put forward on behalf of the department be accepted the result will be somewhat anomalous in a case in which an unregistered firm consists of partners one of whom is a Hindu undivided family, as on the profits received by individual partners none of them except the Hindu undivided family will be liable to pay super-tax, the firm itself having already paid it. The Hindu undivided family though similarly situated will be called upon to pay super-tax a second time. It seems to us that the Proviso to Section 55 provides in case of super-tax what Section 14 (2) (*b*) does in reference to income tax. The scheme of the Act appears to be that where the income of an assessee is part of the income of a firm which has already paid income tax and super-tax the assessee should not be called upon to pay any income tax or super-tax on the amount received by him as his share of the profits of the firm. The use of the word "individual" in the Proviso was not, in our opinion, intended to exclude from its benefit a Hindu family. It cannot be denied that the word is wide enough to include a group of persons forming a unit. The context in which it occurs suggests to our mind that it has been used to indicate one of the component parts of an unregistered firm. It is followed by the words "having a share in the firm"

which indicates that the word is intended to connote an "individual partner", be he a person or the legal entity, the Hindu undivided family.

The argument that only a single individual as distinguished from a Hindu undivided family was intended to have the benefit of the Proviso because he is liable to pay super-tax on his income in excess of Rs. 30,000 while a Hindu undivided family is exempt from super-tax where its income does not exceed Rs. 75,000 does not impress us. The reason why a higher limit is fixed for a Hindu undivided family is obviously the consideration that its income is shared by all the co-parceners, whereas in the case of an ordinary individual the income belongs to him exclusively.

For these reasons we think that the word "individual" in the Proviso to Section 55 includes a Hindu undivided family and the difficulty in adopting that construction is due to the somewhat inartistic drafting of it.

The result is that we answer the question referred to us in the negative. We assess the fee of the advocate for the Commissioner at Rs. 150. The costs of this reference shall be paid by the department. The legal practitioner's fee, for which a certificate has been filed shall be taxed as costs.

Reference answered.

[IN THE CALCUTTA HIGH COURT.]

COMMISSIONER OF INCOME TAX, BENGAL

v.

HUNGERFORD INVESTMENT TRUST, LTD.

LORT-WILLIAMS and JACK, JJ.

January 11, 1935.

INCOME TAX—PRACTICE—APPLICATION FOR LEAVE TO APPEAL TO PRIVY COUNCIL—WHETHER GOVERNED BY ORIGINAL SIDE RULES—NATURE OF HIGH COURT'S JURISDICTION IN INCOME TAX REFERENCES—CIVIL PROCEDURE CODE (ACT V OF 1908), SECTIONS 122, 129 AND 98, ORDER 45—CALCUTTA HIGH COURT RULES AND ORDERS, CHAP. XXXIII—INCOME TAX ACT (XI OF 1922), SECTIONS 66 AND 66-A.

The jurisdiction conferred on the High Courts by Section 66 of the Indian Income Tax Act is a special jurisdiction and forms no part of the High Courts' Original or Appellate jurisdiction.

Rules contained in Chapter XXXIII of the Rules and Orders of the Calcutta High Court in so far as they alter the provisions of

Order 45 of the Civil Procedure Code apply to matters arising within the Original Civil jurisdiction of the High Court and have no application to income tax appeals which are governed solely by the provisions of the Civil Procedure Code.

Cases referred to:

ALCOCK ASHDOWN CO., LTD. *v.* CHIEF REVENUE AUTHORITY [1923] (I.L.R. 47 Bom. 742; 50 I.A. 227; 28 C.W.N. 762; 75 I.C. 392; A.I.R. 1923 P.C. 138; 1 I.T.C. 221).

MAKHAN LAL RAM SARUP, *In re* [1925] (86 I.C. 27; 23 A.L.J. 40; A.I.R. 1925 All. 298; 1 I.T.C. 416).

RAJA PROBHAT CHANDRA BARUA, *In re* [1925] (I.L.R. 52 Cal. 546; 87 I.C. 653; A.I.R. 1925 Cal. 593; 1 I.T.C. 414).

SMITH *v.* WILLIAMS (8 Tax Cas. 321).

Application by the Commissioner of Income Tax, Bengal, for a certificate for leave to appeal to the Privy Council against the decision of the Calcutta High Court in *The Hungerford Investment Trust, Ltd., In re,* reported at (1935) 3 I.T.R. at p. 65.

JUDGMENT.

LORT-WILLIAMS, J.—This is an application by the Commissioner of Income Tax, Bengal, for a certificate that this is a fit case for appeal to His Majesty in Council.

The petition was presented on November 12th, the first day of sitting of the Court after the long vacation and was within time. But counsel on behalf of the respondents objected that although the petition had been served upon his clients, the notice of motion served upon them was insufficient because it was not in proper form. The notice omitted to call upon the opposite party to show cause as required by Chapter XXXIII, Rule 3, of the Rules and Orders of this Court. The Court gave leave to the petitioner to amend the notice and directed him to re-serve it. This was done on November 13th.

Counsel for the respondents then objected that the petition was barred by limitation because the amended notice was not given for the first day fixed for hearing Privy Council matters after the long vacation, as required by the rule and the provisions of the Limitation Act.

The Advocate-General on behalf of the petitioner countered this objection by arguing that Chapter XXXIII, Rule 3, thereof has no application to income tax appeals, and that these are governed solely by the provisions of the Code of Civil Procedure. The point is of importance, because hitherto it has been assumed that the practice on petitions for leave to appeal to the Privy Council in income tax matters is governed by Chapter XXXIII,

and this practice has been followed for many years. Rules under the Income Tax Act have been made by this Court and are contained in Chapter XXX-A, but they do not touch the point in issue which is a matter of practice.

Section 106 (2) of the Government of India (Consolidating) Act, 1915, provides that

"The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue or concerning any act ordered or done in the collection thereof, according to the usage and practice of the country or the law for the time being in force."

But Section 66 (1) of the Income Tax Act provides that "If in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chapter VIII, a question of law arises, the Commissioner may, either on his own motion or on reference from any income-tax authority subordinate to him, draw up a statement of the case and refer it with his own "opinion thereon to the High Court"; and sub-Sections (2) and (3) provide for similar references at the instance of the assessees.

Sub-Section (5) provides "The High Court, upon the hearing of any such case, shall decide the questions of law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded and shall send to the Commissioner by whom the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Commissioner shall dispose of the case accordingly...."

It is clear, therefore, that the jurisdiction conferred upon the Court by this section is a special jurisdiction and forms no part of the Court's original or appellate jurisdiction. (See *Raja Probhat Chandra Barua's Case*, and *Alcock Ashdown Case*) and, as was decided in the case of *In re Makhan Lal Ram Sarup*, the High Court is not a Court of appeal in income tax cases. Its functions are confined strictly to the disposal of references on points of law under this section.

Section 66-A (1) provides that "When any case has been referred to the High Court under Section 66, it shall be heard by a Bench of not less than two Judges of the High Court, and in respect of such case the provisions of Section 98 of the Code of Civil Procedure, 1908, shall, so far as may be, apply notwithstanding anything contained in the Letters Patent of any High Court established by Letters Patent or in any other law for the time being in force."

Sub-Section (2) provides that "An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under Section 66 in any case which

the High Court certifies to be a fit one for appeal to His Majesty in Council."

Sub-Section (3) provides that "the provisions of the Code of Civil Procedure, 1908, relating to appeals to His Majesty in Council shall, so far as may be, apply in the case of appeals under this section in like manner as they apply in the case of appeals from decrees of a High Court."

Sub-Section (5) provides that "Nothing in this section shall be deemed—(*a*) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise however, or (*b*) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee."

Section 98 (1) of the Code of Civil Procedure provides that "Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges."

Section 98 (2) provides that "Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed.

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal including those who first heard it."

Section 98 (3) provides that "Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court."

Sections 109-112 and Order 45 in the First Schedule deal with the matter of appeals to the King in Council.

Order 45, Rule 2, provides that "Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of."

Rule 3 provides that (1) "Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of

Section 110, or that it is otherwise a fit one for appeal to His Majesty in Council."

(2) "Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted."

Section 121 of the Code provides that "The rules in the first Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this part."

Section 122 provides that "High Courts established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and the Chief Court of Oudh, may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule."

Section 123 provides for the constitution of a Committee to be called the Rule Committee.

Section 124 provides that "Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the first Schedule or to make new rules, and before making any rules under Section 122 the High Court shall take such report into consideration."

Section 126 provides that the Rules shall be subject to certain sanctions.

Section 127 provides for the publication of the rules in the Gazette of India or the local official Gazette, as the case may be.

Section 128 states the matter for which the rules may provide.

Section 129 provides that "Notwithstanding anything in this Code, any High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code."

No rules have been made by this Court under the provisions of Section 122 which alter the provisions of Order 45. The rules in Chapter XXXIII, so far as they have the effect of altering the provisions, have been made under Section 129 and apply to

matters arising within the original civil jurisdiction of the Court and therefore have no application to income tax appeals. The Act does not lay down any rules of procedure for references under Section 66 of the Code and this Court has made the rules contained in Chapter XXX-A. This it had jurisdiction to do in the absence of any specific provision in the Act. [*Smith* v. *Williams*, (8 Tax Cases 321), per SANKEY, J.]. In Section 66-A specific provision has been made and the procedure therein laid down must be followed.

The result is that the petition in this case was presented to the Court within time, and the Court directed notice to be served on the opposite party as provided in Order 45. In my opinion, this case raises a substantial question of law, and is one of great public importance, and is a fit case for appeal to His Majesty in Council. Therefore, the certificate is granted and the petition allowed with costs.

JACK, J.—I agree.

Certificate granted.

[IN THE RANGOON HIGH COURT.]

COMMISSIONER OF INCOME TAX, BURMA

v.

M. A. L. CHETTIYAR FIRM, RANGOON.

Page, C.J., Mosely and Ba U, JJ.

January 28, 1935.

INTEREST—TAKING FRESH PROMISSORY NOTE FOR INTEREST—INTEREST ENTERED IN ACCOUNTS AS RECEIVED AND SO STATED IN PROFIT AND LOSS ACCOUNT—INCOME TAX—INCOME TAX ACT (XI OF 1922), SECTIONS 10 AND 13.

Where a debtor executed a promissory note for Rs. 27,518 being interest due on a prior debt and both in the interest account of the assessees and in the account which they kept relating to the debts of their respective debtors, the interest in question was shown as having been received by the assessees during the year of account, and it was so stated in the profit and loss account of the firm :— Held, *that there was material upon which the income tax authorities could come to the conclusion that the sum of Rs. 27,518 was interest upon loans that had accrued to the assessee in the accounting year and as such assessable to income tax.*

In effect what happens in such cases is that the assessees are content to stay their hand in connexion with the recovery of the loan and interest under the old transaction in consideration of the obligation undertaken by the debtors under the new promissory note which consists of the interest due under the old loan

which is capitalised for the purpose of the new transaction. In other words, the assessees were investing the old interest as capital in the new loan.

Cases referred to :

COMMISSIONER OF INCOME TAX, BURMA *v.* V. S. A. R. FIRM, RANGOON, [1935] (3 I.T.R. 158 ; 13 RANG. 123.)

SECRETARY OF THE BOARD OF REVENUE, INCOME TAX, MADRAS *v.* ARUNACHALAM CHETTIAR AND BROTHERS [1921] (A.I.R. 1921 MAD. 427 ; 59 I.C. 482; 44 MAD. 65) (S. B.).

RAJA RAGHUNANDAN PRASAD SINGH *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA, [1933] (1 I.T.R. 113; A.I.R. 1933 P.C. 101; 142 I.C. 446; 60 I.A. 133; 12 Pat. 305) (P.C.).

A. Egger, for the Commissioner of Income Tax.

N. M. Cowasjee, for the assessees.

PAGE, C. J.—In this case the question propounded is :

" Whether there was evidence on which the Income Tax Officer could conclude that the assessees' method of accounting was the mercantile or accrued method in respect of the sum of Rs. 27,518, interest from non-Chettyar debtors shown in the assessees' accounts and taxed in the assessment ".

In my opinion this case is governed by the decision of this Court in *Commissioner of Income Tax, Burma* v. *V.S.A.R. Firm, Rangoon.* The only difference in the facts between the two cases is that, whereas in *Commissioner of Income Tax, Burma* v. *V.S.A.R. Firm, Rangoon*, the new promissory note related both to the principal and the interest that had accrued upon it, the new promissory note in the present case refers to the interest only. In my opinion the same principle governs the two cases. As was pointed out in *Commissioner of Income Tax, Burma* v. *V.S.A.R. Firm, Rangoon*, the real question that falls for determination is ;

" Whether there were materials before the Income Tax Officer upon which he could find that the sum of Rs. 57,511 was interest upon loans that had accrued to the assessees in the accounting year, and as such was assessable to income tax for the year 1933-34 ".

We have heard an elaborate argument on behalf of the assessees, the burden of which was that the Income Tax Officer had arrived at a wrong conclusion upon the materials before him. It is necessary to emphasize once more that the question is not whether the conclusion at which the income tax authorities arrived was correct, but whether there was material before the income tax authorities upon which they could have arrived at the conclusion

which they reached. There is little to add to the judgment in *Commissioner of Income Tax, Burma* v. *V.S.A.R. Firm, Rangoon.* It is not uninstructive however, to notice how the matter was put in a case to which the learned advocate for the assessees referred, *Secretary to the Board of Revenue, Income Tax, Madras* v. *Arunachalam Chettiar and Brothers.* In that case a Special Bench of the Madras High Court was dealing with a case stated under Section 51 of the Income Tax Act (VII of 1918), and, as WALLIS, C.J., pointed out, the only question that was argued in that case was:

"Whether money which became due to a money-lending firm in the course of its business by way of interest in the year of account or year on the income of which the tax is to be assessed for the current year, is to be treated as part of the assessable income for that year of account, although it was not recovered or realised by the firm in that year, either in cash or by adjustment in the account."

And in course of his judgment NAPIER, J., (at p. 92 of I.L.R 44 Mad.) expressed the opinion that "if a person entitled to receive money agrees with his debtor to let the money stand in the hands of the debtor, either by way of deposit or as a fresh loan or investment, that would, in my opinion, amount to receipt."

In the present case in the course of the argument I asked the learned advocate for the assessees what his defence would be if after a fresh promissory note had been executed a suit had been brought against the debtors to recover the interest due under the old loan, and his answer inevitably was that the old loan had been discharged by the acceptance of the new promissory note. As was pointed out in the *Commissioner of Income Tax, Burma* v. *V. S. A. R. Firm, Rangoon,* in *Raja Raghunandan Prasad Singh* v. *Commissioner of Income Tax, Bihar and Orissa,* Lord Macmillan had observed:

"that the sum of Rs. 2,33,135 was not shown separately as interest realised in the assessees' books of account of that year (*i.e.,* 1904) either in the interest account or in the personal account of the debtor—a finding which seriously stultifies the question as framed by the Commissioner."

Now, in the present case as in *Commissioner of Income Tax, Burma* v. *V. S. A. R. Firm, Rangoon,* both in the interest account of the assessees and in the account which they kept relating to the debts of their respective debtors the interest in question is shown as having been received by the assessees during the year of account, and it is so stated in the profit and loss account of the firm.

The learned advocate for the assessees contended that it was inevitable that this sum, representing the interest under the old loan should have been entered as "received" in the interest account and the debtors' account kept by the assessees. He stated

that the assessees "must give credit for the interest in their accounts": but that is not so. Where accounts as between the assessees and other Chettiyar firms are concerned no doubt according to the system of accounting adopted by the assessees interest accrued during the accounting year is entered in the accounts as interest for which the assessees took credit as having been received during the accounting year, and as they have adopted that method of accounting in respect of other Chettiyar firms no complaint is raised to the effect that notional receipts of interest should not be treated for purpose of income tax as upon the same footing as actual receipts.

The mercantile system probably works out as satisfactorily to the assessees and the income tax authorities as does the method of accounting known as the cash system. But it so happens that in connection with their transactions with non-Chettyars the assessees normally adopt the cash system, and if in connection with a transaction such as that under consideration in which a fresh loan is taken for debts already accrued from non-Chettyars the cash system of accounting had been adopted, so far from there being any necessity for an entry in their books of account that the assessees had "received" the interest, which had accrued but not been actually received, such an entry would have been contrary to the form of accounting that they had adopted. It appears however that in transactions with non-Chettyars in which a fresh loan is taken for an accrued debt the assessees—indeed the Chettiyar community in general—adopt the mercantile system of accounting, and on the acceptance of a new promissory note treat the interest which forms part of the capital loan under the new promissory note as having been received by the assessees from their debtors. In effect what happens is that the assessees are content to stay their hand in connection with the recovery of the loan and interest under the old transaction in consideration of the obligation undertaken by the debtors under the new promissory note which consists of the interest due under the old loan which is capitalised for the purpose of the new transaction. In other words, as the learned Government Advocate pointed out, the assessees were investing the old interest as capital in the new loan.

In such circumstances it appears to me that there was material before the Income tax Officer upon which he could come to the conclusion that the sum of Rs. 27,518, was interest upon loans that had accrued to the assessees in the accounting year, and as such was assessable to income tax for the year 1933-34.

I would answer the question propounded in the affirmative. The learned Government Advocate is entitled to his costs, ten gold mohurs.

MOSELY, J.—I agree.

BA U, J.—I agree.

Question answered.

[IN THE ALLAHABAD HIGH COURT.]

PARBHU LAL PEARY LAL v. COMMISSIONER OF INCOME TAX, CENTRAL AND UNITED PROVINCES.

Niamatullah and Bennet, JJ.

23rd November, 1934.

FIRM—HINDU UNDIVIDED FAMILY—WHETHER CAN BE PARTNER IN A FIRM—'FIRM', 'PARTNERSHIP', MEANINGS OF—INCOME TAX ACT (XI OF 1922), SECTION 2 (6-A), SECTION 26-A.

No partnership could be legally constituted between a joint Hindu family and a firm.

The ruling in Jai Dayal Madan Gopal, In re [1933 I. T. R. 186] *that one firm cannot legally be a partner in another firm is not confined to registered firms but applies to all firms.*

Reference made by the Commissioner of Income Tax, Central and United Provinces, under Section 66 (2) of the Income Tax Act, XI of 1922 [Mis. Case No. 384 of 1933].

S. K. Dar and *Din Dayal*, for the assessee.

K. Verma, for the Commissioner of Income Tax.

The judgment of the Court was delivered by

NIAMATULLAH, J.—This is a reference by the Commissioner of Income Tax on a direction of this Court on an application made by an assessee. The facts are somewhat complicated. There is a joint family in Muttra which has various firms and one of those firms is styled Parbhu Lal Pearey Lal. This firm Parbhu Lal Pearey Lal has been in existence with effect from the year 1932-33. Previous to that there was no separation in the joint family and the joint family was somewhat loosely described as Parbhu Lal Pearcy Lal. An assessment was made for the year 1931-32 on the income of the previous year and in making that assessment the Income Tax Officer of Muttra found in the books of the joint family a certain khata called Onkar Mal Babu Lal sir account which stood as follows:—

	Rs.	A.	P.
Credit	78,910	2	9
Debit	47,299	14	0
Profit	31,610	4	9
TOTAL ...	78,910	2	9

Enquiries were made from Bombay and it was found that the Bombay firm of Onkar Mal Babu Lal had heavy losses during the

year under assessment and the Muttra joint family Parbhu Lal Pearey Lal had also losses. No income-tax therefore was assessed on either the joint family in Muttra or the firm Onkar Mal Babu Lal in Bombay, but the income-tax authorities have assessed income-tax on what they allege to be a firm constituted by the partners, one partner being the joint family Parbhu Lal Pearey Lal in Muttra and other partner being the firm Onkar Mal Babu Lal in Bombay. The transactions of this alleged partnership show a profit and therefore that profit has been assessed to income-tax. Objection was taken by Parbhu Lal Pearey Lal and those objections were overruled and Parbhu Lal Pearey Lal also submitted an application to the Income Tax Commissioner to make a reference to this Court. The Income Tax Commissioner held that no question of law arose as in his opinion there was a partnership. This Bench held that the decision as to whether there was a partnership was a decision on a question of law and that as a question of law had arisen under Section 60 (2) the Income Tax Commissioner was bound to make a reference to this Court. Accordingly this Court selected seven of the questions in the application of Parbhu Lal Pearey Lal and required the Commissioner to make a statement on the case. That statement has now been supplied.

The first of these questions is:

'Whether the association of the firm, Messrs. Parbhu Lal Pearey Lal of Muttra and of the firm Messrs. Onkar Mal Babu Lal of Bombay in certain joint transactions in 1929-30 could and did form in law a new partnership or a new firm within the meaning of Section 239 of the Indian Contract Act or of any other law.'

Learned counsel for Commissioner has taken objection to the wording of this question and he alleges that the attention of the Income-tax Commissioner was not drawn to the importance of the word "firm" and that in fact Parbhu Lal Pearey Lal of Muttra during the year in question were not a firm but were a joint Hindu family. This in fact has been stated by the Commissioner. Learned counsel desired further that enquiry should have been made in regard to Onkar Mal Babu Lal of Bombay. But we consider that it is too late now to raise any point as to whether Onkar Mal Babu Lal are a firm or a joint Hindu family as all along they have been described by the Commissioner and the authorities under him as a firm. Therefore the question is whether a partnership can be formed by an association of a joint Hindu family in Muttra with a firm in Bombay. This question of the interpretation of the word "partnership" has been already before this Court. We may mention that in Section 3 of the Income Tax Act income-tax may be charged

'On all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals.'

The only word in this section under which the alleged partnership could be brought is the word "firm". In Section 2 (6-A) it is stated that "Firm", "partner" and "partnership" have the same meanings respectively as in the Indian Contract Act, 1872. In Section 239 of the Contract Act it is stated:

'Partnership is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business and to share the profits thereof between them.'

Persons who have entered into a "partnership" with one another are called collectively a "firm". No doubt, in the General Clauses Act which was in force at the time of the Contract Act there was a definition which is similar to the definition in the General Clauses Act, X of 1897, for the word "person". Th.s definition in Section 3 (39) states that "person" shall include any company or association or body of individuals, whether incorporated or not. If, therefore, that definition were to be applied to the Contract Act, Section 239, then the argument for the Commissioner would be correct. It is however provided in Section 3 of the General Clauses Act that these definitions should not be applied if there is anything repugnant in the subject or context. In Chapter XI on Partnership in the Contract Act there are various provisions in regard to the death of partners and matters of that nature which will clearly not apply to a firm. This matter has already been considered by a Bench of this Court in a ruling reported in *Jai Dayal Madan Gopal of Benares—In the matter of* [(1933) 1 I.T.R. 186]. The reference in that case was:

'Whether having regard to the deed of partnership, dated April 16, 1928, and to other relevant evidence on the record, the finding that the registered firm Jai Dayal Madan Gopal of Benares is in its corporate capacity a partner in nine other firms bearing the same name was a legal and proper finding?'

Both learned judges held that one firm cannot legally be a partner in another firm. Learned counsel for the Commissioner argued that this ruling was in regard to registered firms. A firm is registered under Section 26-A of the Income Tax Act and any firm constituted under an instrument of partnership specifying the individual shares of the partnership may apply for registration. It will be observed that this provision prevents a Hindu joint family from applying for registration as a firm. But we are of opinion that the ruling in question does not draw a distinction between a registered firm and any firm. On page 1,000 (of 1932 A.L.J.) the learned Chief Justice, stated:

'But if the question were asked whether one firm can legally be a partner in another firm then I would unhesitatingly proceed to answer it. There is authority for the view that one firm cannot legally be a partner in another firm.

This passage shows that no importance was attached by their Lordships to the point that the firms in that particular case had been registered under the Income Tax Act. We consider that we should follow this ruling in the present case and we therefore hold that no partnership could be legally constituted between the Bombay firm and the Hindu joint family in Muttra. Under these circumstances the answer to the first question must be in the negative. This governs all the other remaining six questions in the case and in our opinion the income tax authorities have no power to impose a fine under Section 25 of the Act on the ground that the alleged partnership did not report its discontinuance. With these observations we direct that our opinion shall be forwarded to the Income Tax Commissioner. We allow costs to the applicant at Rs. 200 for which a certificate has been filed. This covers the present hearing and also the former hearing. We also assess for the use of the department the fees of learned counsel for Commissioner at Rs. 150.

Reference answered.

[IN THE ALLAHABAD HIGH COURT.]

SHIVNATH PRASAD

v.

COMMISSIONER OF INCOME TAX, CENTRAL AND UNITED PROVINCES.

Niamatullah and Bennet, JJ.

March 1, 1935.

REFERENCE—APPEAL TO ASSISTANT COMMISSIONER DISMISSED AS TIME-BARRED—REFERENCE, COMPETENCY OF—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 31, 32 AND 66 (3).

Where an appeal to the Assistant Commissioner is dismissed on the ground that it is time-barred there is no order under Section 31, 32 or 33 of the Income Tax Act and the High Court cannot direct the Commissioner of Income Tax to state the case under Section 66 (3) of the Act.

JOT RAM SHER SINGH *v.* COMMISSIONER OF INCOME TAX, CENTRAL AND UNITED PROVINCES [1934] (I.L.R. 56 All. 933; 1934 I.T.R. 129) referred to.

Application under Section 66 (3) of the Income Tax Act, for an order requiring the Commissioner of Income Tax, Central and United Provinces, to state a case, and refer certain questions of law to the High Court. [Misc. Case No. 677 of 1934.]

Shabd Saran, for the applicant.

ORDER.—This is an application under Section 66 (3) of the Income Tax Act for an order of this Court requiring the Income Tax Commissioner to state a case under Section 66 (2) of the same Act. The applicant was assessed to tax by the Income Tax Officer. He preferred an appeal to the Assistant Commissioner after more than thirty days from the date of the notice of demand. The Assistant Commissioner fixed a date calling upon the assessee to show cause why the appeal should not be rejected as one filed beyond time. On the date so fixed and after hearing the assessee the appeal was rejected. The assessee applied to the Income Tax Commissioner for revision of the order of the Assistant Commissioner. His application was dismissed. He then applied to the Income Tax Commissioner for statement of case under Section 66 (2). This application was also rejected. Thereupon he filed the present application.

It has already been held by this Bench in *Jot Ram Sher Singh* v. *Commissioner of Income-tax*, that the High Court can require the Income Tax Commissioner to state a case only if the conditions required by Section 66 (2) are made out and that one of those conditions is that an order under Section 31 or Section 32 or Section 33 should have been passed in the case. It appears to us that no order under any of those sections was passed in the present instance. A reference to Sections 30 and 31 of the Income Tax Act shows that an appeal is filed under the former section, and if it is admitted as an appeal presented in time, the appeal is ripe for hearing and a date is fixed for its disposal on the merits. It is only after that stage that the Assistant Commissioner functions under Section 31 and can dispose of the appeal by confirming, reducing, enhancing or annulling the assessment or setting aside the assessment and directing the Income Tax Officer to make a fresh assessment, etc. Section 30 (2) prescribes the period of limitation for appeals which according to that sub-section should :

'Ordinarily be presented within thirty days of receipt of notice of the demand relating to the assessment or penalty objected to or of the date of the refusal to make a fresh assessment under Section 27, as the case may be.'

The Assistant Commissioner is however authorised to admit an appeal after the expiration of that period, if he is satisfied that the appellant had sufficient cause for not presenting it within that period. If the Assistant Commissioner is satisfied and admits the appeal, the order is one under Section 30 (2). If he is not satisfied that the appellant had sufficient cause, he refuses to admit the appeal, in which case no appeal can be registered and disposed of in the manner laid down by Section 31 and no order under Section 31 can be passed. It follows that action under Section 66 (2) cannot be taken if the appeal has not proceeded beyond the

stage referred to in Section 30 (2), and the High Court cannot direct the Commissioner to state a case.

The learned advocate for the appellant contends that the Assistant Commissioner dismissed the appeal presented before him though it may be that it was dismissed on the ground that it was barred by limitation. Accordingly, he argues that the order is one confirming the assessment within the meaning of Section 31, Income Tax Act. We do not think that this contention is sound. An order confirming the assessment is an order which has reference to the assessment and which affirms it. Where the question of assessment is not even considered and the appeal is rejected as one barred by limitation, the order of dismissal cannot be considered to be one confirming the assessment. As already stated the order of the Assistant Commissioner in this case properly described is not an order dismissing the appeal but is an order refusing to entertain the appeal.

For the reasons stated above we hold that Section 66 (2) of the Income Tax Act does not apply, and the High Court cannot direct the Commissioner to state a case for the decision of the question of law said to arise from the order of the Assistant Commissioner. We express no opinion as to whether the question which the applicant desires to be considered by the High Court is a question of law. The application is dismissed.

Application dismissed.

[IN THE CHIEF COURT OF OUDH.]

RAJA SAYYID MOHOMED MEHDI

v.

COMMISSIONER OF INCOME TAX, CENTRAL AND UNITED PROVINCES.

Srivastava and Zia-ul-Hasan, JJ.

March 1, 1935.

RETURN—RETURN SIGNED AND VERIFIED BY AGENT—VALIDITY—CONSTRUCTION OF POWER OF ATTORNEY—DUTY OF INCOME TAX OFFICERS—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 22 AND 28.

The relevant portion of a mukhtarnama *(power of attorney) was as follows: 'Therefore, I appoint......as my* mukhtar-i-ams, *and any suits filed by them in Civil Courts, Revenue Courts...... and other Government Departments or any applications filed by them on my behalf...or plaints, memoranda of appeal or written statements or affidavits filed in support of any application...all such proceedings shall be accepted by me as having been done by*

me personally'. An income tax return was signed and verified and filed by the mukhtar-i-ams:

Held, *that as the general object of the power of attorney was to empower the* mukhtar-i-ams *to represent the principal in proceedings in Courts, and further, as an income tax return is neither an application nor a written statement, the agent had no power to make a return and the return was not binding on the principal.*

Dictum, "*It is the duty of Income Tax Officers before they accept returns signed and verified by agents to satisfy themselves about the authority of agents to do so.*"

Reference made by the Commissioner of Income Tax, Central and United Provinces, under Section 66 (2) of the Income Tax Act, 1922. [Civil Ref. No. 1 of 1935].

H. S. Gupta, for the Commissioner of Income Tax.

Wasim, Khaliquzzaman and *Faiyas Ali*, for Muhammad Taqi.

ORDER.—This is a reference by the Commissioner of Income Tax, Central and United Provinces, under Section 66 (2), Income Tax Act (XI of 1922).

The facts which have given rise to this reference are briefly these: A return of income for the year 1932-33, was filed on behalf or Raja Saiyid Mohammad Mehdi, Talukdar of Pirpur, District Fyzabad, by one Asghar Husain Khan, a *mukhtar* of the Raja. The said return was also signed and verified by the same Asghar Husain Khan. The Income Tax Officer of Fyzabad did not accept the return and called upon the assessee to produce his accounts. When the accounts were produced, he found that the return in question did not contain a correct statement of the income, and therefore assessed the Raja on a larger income than that shown in the return. At the same time he issued a notice to the Raja to show cause why a penalty under Section 28 of the Act should not be levied upon him. The Income Tax Officer did not accept the explanations which were given on behalf of the Raja for the omission of certain items of income from the return in question and levied a penalty against him of Rs. 5,000. The Raja filed an appeal against this order of the Income Tax Officer to the Assistant Commissioner, who dismissed the appeal. He then made an application under Section 66 (2) of the Act demanding a reference to the High Court of certain questions of law arising out of the order imposing the penalty under Section 28. Thereupon the Commissioner of Income Tax made the present reference. The questions referred by him are as follows; (1) In the circumstances of this case, was the return of income filed by Asghar Husain Khan, the *mukhtar-i-am* of the assessee, such a return as could be held to be binding on the assessee? (2) If the answer to question (1) is in the affirmative, was it essential for the Assistant Commissioner to establish that the false return had been filed

with the knowledge and connivance of the assessee before he could confirm the order of the Income Tax Officer imposing penalty under Section 28, Income Tax Act?

As regards the first question, it has been argued on behalf of the assessee that the return in question is not binding on him, firstly because according to the provisions of the Income Tax Act, the return must be signed by the assessee himself, and secondly, because on a proper interpretation of the power of attorney in favour of Asghar Husain Khan, he had no authority to sign or verify such a return on behalf of the Raja. As regards the general question whether under the provisions of the Income Tax Act a return of income required to be filed under Section 22, Clause (2), must be signed and verified by the assessee himself or can be signed and verified by an authorised agent, it has been objected by the learned Government Advocate that this question was not specifically raised by the assessee before the Commissioner of Income Tax and is not included within the questions referred by him to this Court. The learned Counsel for the assessee, on the other hand, maintains that the question is fully covered by the grounds raised by him in his application for reference under Section 66. He further contends that in any case this Court has authority to resettle issues and answer all questions of law, which properly arise out of the order complained of. In view of the opinion which we have formed as regards the second ground, we do not think it necessary to express any opinion as regards the powers of this Court in the matter of re-settling issues, and would, under the circumstances, leave the general question raised on behalf of the assessee undecided.

Next as regards the question about the authority of Asghar Husain Khan to sign and verify the return on behalf of the assessee, the determination of this question in our opinion must proceed mainly upon the interpretation of the *mukhtarnama* given in App. D of the case submitted by the Commissioner of Income Tax. The relevant clause of this *mukhtarnama* is as follows:

"Therefore, I appoint . . . . . . as my *mukhtar-i-ams* and any suits (nalishat) filed by them in Civil Courts, Revenue Courts, Collectorates, Criminal Courts, Appellate Courts, in the Settlement Department, Cantonment, Police, Municipalities in British India, Chief Court, High Court, Commissioner's Court, Board of Revenue and other Government departments, or any applications (darkhasts) filed by them on my behalf . . . or plaints, memoranda of appeal, or written statements, or affidavits filed in support of any application. . . . All such proceedings shall be accepted by me as having been done by me personally." Though there is no express mention of the Income Tax Department, yet we think that the words "other Government departments" are sufficiently wide to include the department of Income Tax. It has been argued that the return of income filed under

Section 22, Clause (2), Income Tax Act, should be regarded as an application or a written statement within the meaning of the terms of the *mukhtarnama*. It has also been pointed out that when the *mukhtar* was authorized to file affidavits in support of an application, it should include the authority to file a return of income such as is required by Section 22. We find ourselves unable to accede to the argument. In *Jonmenjoy Coondoo* v. *George Alder Watson* (10 Cal. 901), in which case also the question was as regards the interpretation of a power of attorney, their Lordships of the Judicial Committee remarked as follows:

"In order to see what was intended by these words, they must be looked at in connexion with the context as well as with the general object of the power."

It seems to us that the general object of the power in the present case was that the agent should be able to represent his principal in proceedings in Courts so as to dispense with the necessity of the principal appearing personally. This is clearly borne out by the preamble of the document, in which it is said that the executant appoints the persons named in the document as his general agents, because he has often to institute and defend cases (*muqadmat*). Again in *Bank of Bengal* v. *Ramanathan Chetty*, (43 Cal. 527) their Lordships of the Judicial Committee referred with approval to the following observations in *Bryant* v. *La Banque de Peuple* (1893 A. C. 170) and applied the canon of construction laid down therein to the case before them:

"That where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication."

In Katiar's Law of Agency in British India (p. 176) a number of cases have been cited in support of the proposition that a power of attorney must be strictly construed as giving only such authority as it confers expressly or by necessary implication. Applying these principles to the construction of the *mukhtarnama* in favour of Asghar Husain Khan, we are clearly of opinion that it does not give him any authority to sign or verify the return of income for the purposes of assessment of income tax. We are unable to agree with the learned Government Advocate that it can be treated either as an application or as a written statement within the meaning of the *mukhtarnama*. An application in the sense in which it has been used in the *mukhtarnama*, in our opinion means a document containing some request to the authority to whom the application is made. The return in question cannot be treated as an application in this sense. It is merely a declaration of the assessee as regards his income. We have also looked into

the prescribed form for such returns. It does not contain any request or prayer addressed to the income tax authorities. It is also impossible to treat it as a written statement which term appears to have been used in the *mukhtarnama* in the technical sense of a written reply to a plaint filed in Court.

We have little doubt that when this *mukhtarnama* was drafted, the idea of the *mukhtar* signing and verifying income tax returns or even of their representing the principal before the income tax authorities was not present in the mind of the person who drafted it. The central idea of it was to make provison for representation of the principal in Court litigations and proceedings. It is also argued by the learned Government Advocate that in any case the agency need not be created expressly but can also be implied. In the case of Asghar Husain Khan who was appointed a *mukhtar* by a written deed, there seems no question of any implied agency. The powers conferred upon him as agent have been definitely set forth in the written *mukhtarnama* and we can see no justification for going outside its terms. Lastly it has been argued that the present case is one of an agency by estoppel. Reliance has been placed on the fact that Asghar Husain Khan had also verified the return for the preceding year 1931-32 and that in previous year, such returns were signed by the manager or some *mukhtar* of the assessee. We have a mention of this also in the order of reference of the Commissioner of Income Tax, which shows that Raja Saiyid Muhammad Mehdi was assessed to income tax for the first time in the year 1927-28 and that the return for that year was verified by a *mukhtar*, Saiyid Hasan Raza. We know nothing about the returns filed in the two following years but in 1930-31 the Raja appended his signature to the return under that of his manager, who had verified it. These facts do not show any uniform practice on the part of the assessee. Moreover, as stated before, we have no information as to the return for two years. In any case we do not think that the facts stated above are sufficient to substantiate a plea of estoppel.

"Whoever deals with an agent is put on his guard by that very fact, and does so at his risk. It is his right and duty to inquire into and ascertain the nature and extent of the powers of the agent, and to determine whether the act or contract about to be consummated comes within the province of the agency and will or not bind the principal. It is the duty of third persons at their peril to ascertain what kind of an agent one is who represents himself as such and the extent of his powers." (Katiar's Law of Agency, pp. 155-156).

It seems to us that it is the duty of the Income Tax Officers before they accept returns signed and verified by agents to satisfy themselves about the authority of such agents to do so. The Income Tax Officer has easy means for gaining such knowledge by looking into the *mukhtarnama*, which was a registered document. There is no evidence

before us to show that the return in question had been filed with the authority or even with the knowledge of the Raja, but assuming that he had knowledge, it seems obvious that the income tax authorities have not in any way changed their position to their detriment on account of any implied representation on the part of the Raja about Asghar Husain Khan's authority to sign and verify the return. We are therefore of opinion, that in the circumstances no question of estoppel can arise. Reference is also made by the learned Government Advocate to Pollock's Law of Contract, at p. 649, and Katiar's Law of Agency at p. 176 in support of the contention that where the authority of an agent is conferred in ambiguous terms so as to be fairly capable of more than one construction every act done by him in good faith, which is warranted by any one of those constructions is deemed to have been duly authorized. We think that there is no room for the application of this principle in the present case, because the terms of the *mukhtarnama* appear to be quite clear and unambiguous.

It was also contended that the act of Asghar Husain Khan in filing the return, even though at the inception unauthorized, should be deemed to have subsequently been ratified by the Raja, when in compliance to the notice issued by the Income Tax Officer under Section 23, Income Tax Act, he made Asghar Husain Khan appear and produce the accounts, which the Raja had been called upon to produce. When the Raja was called upon to produce his account books he was in duty bound to do so. Section 23 allows an assessee to produce the evidence himself or to cause it to be produced by some other person. It was a mere accident that the person deputed for the production of the accounts was Asghar Husain Khan. We think that in the circumstances the production of these account books cannot constitute any ratification in respect of the return of income. The result therefore is that we answer the first question in the negative. In view of the answer given to this question, the second question does not arise. We make no order as to costs.

Order accordingly.

[IN THE PRIVY COUNCIL.]

COMMISSIONER OF INCOME TAX, MADRAS

v.

P. R. A. L. MUTHU KARUPPAN CHETTIYAR.

Lord Atkin, Sir John Wallis and Sir Shadi Lal.

May 24, 1935.

PARTNERSHIP—PROFITS PAID TO RETIRING PARTNER—WHETHER ASSESSABLE—DIFFERENCE BETWEEN DISTRIBUTION OF ASSETS IN WINDING UP COMPANIES AND ON DISSOLUTION OF PARTNERSHIP—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 4 (2).

The assessee who was a partner in a firm severed his connection with the firm. An account was taken of the amounts due to him till retirement by way of capital, share of profits and interest. His share of the profits was paid to him in Colombo outside British India. Interest on capital amounting to Rs. 38,305 together with a greater part of the capital sum due was paid to him in Madras. The question arose whether the sum of Rs. 38,305 thus received by the assessee as interest on capital was a capital receipt or income assessable to tax. The Madras High Court held, applying the principles laid down in Burrell's *case* (9 Tax Cas. 27) *that the entire sum received by the assessee on his retirement was a receipt of capital and was not assessable to tax. On appeal to the Privy Council:*

Held, *reversing the decision of the Madras High Court, that the principles laid down in* Burrell's *case relating to distribution of the assets of companies in liquidation were not applicable to dissolution of partnerships. On the dissolution of a partnership an outgoing partner has the right to receive, not as in the case of a share-holder in winding up a company only a share of the assets, but to receive payment of his profits, profits which were his before dissolution and which do not cease to be his on dissolution. The sum of Rs. 38,305 was received by the assessee as a payment of profits and was properly assessable.*

Obiter:—*This decision does not cover cases where undrawn profits have, with the consent of all parties, been invested in the business so as to increase the capital account.*

Cases referred to:

INLAND REVENUE COMMISSIONERS *v.* BURRELL [1924] (2 K.B. 52; 93 L.J.K.B. 709; 131 L.T. 727; 9 TAX CAS. 27) *distinguished.*

COMMISSIONER OF INCOME TAX, MADRAS *v.* SIDDHA GOWDER & SONS [1932] (I.L.R. 55 MAD. 818; 137 I.C. 689; A. I. R. 1932 MAD. 375).

Appeal from a Judgment of the Madras High Court. [Privy Council Appeal No. 5 of 1935]. The Commissioner's statement of

case and the judgment of the Madras High Court will be found reported (1934) 2 I. T. R. at p. 406.

L. DeGruyther, K. C., and *Pringle*, for the Commissioner of Income Tax.

C. Durai and Miss. *G. E. Miles*, for the respondent.

LORD ATKIN.—This is an appeal from the High Court at Madras on a reference under Section 66 of the Indian Income Tax Act, 1922. The question is whether a sum of Rs. 38,305 was a receipt of capital or a receipt of profit assessable under Section 4 (2) of the Income Tax Act. The facts are simple. The respondent is a Chetti carrying on business in Madras where he resides and in various other places within and without British India. He was up to May, 1930, one of three partners in a money-lending business, S.P.K.A.M., at Colombo in which he had a 6¾ share. On May 31, 1930, he severed his connection with that firm, and an account was taken of the amount due to him by way of capital, surplus capital, share of profit and interest thereon: and a sum of Rs. 2,09,670 was found due to him which included Rs. 23,500, share of profits from October 2, 1926, to May 31, 1930, and Rs. 38,305 interest on capital. The Rs. 23,500 was paid to him by *hundis* drawn by the remaining partners and cashed at Colombo. The Rs. 38,305 together with the greater part of the capital sum due was remitted to him in Madras by the promissory note of a debtor of the firm made out in the respondent's favour. No question of fact arises on the reference which can only raise a question of law. The only question for the Court is whether the sum of Rs. 38,305 received by the respondent in Madras in respect of interest on capital employed in business in Ceylon is assessable under S. 4 (2) of the Income Tax Act. No dispute arises as to the sum being derived from business: the only question is whether the effect of the dissolution was to make payment of all the sums due on dissolution payments by way of capital and not payments of income or profits. The High Court, following a decision of their own in *Commissioner of Income Tax, Madras* v. *Siddha Gowder & Sons*, held that the principles laid down, in the English case of *Inland Revenue Commissioners* v. *Burrell* governed the case and decided in favour of the respondent. But that case involved what appears to their Lordships quite a different set of facts, the receipt by a share-holder of his share of the assets of a company upon a winding-up. It was pointed out in the judgments of the Court of Appeal that a company is a separate entity to the share-holders: that during the continuance of the company the latter have no right to the profits except so far as they are distributed on a regular declaration of dividend: and that on winding-up their sole right is to share in the assets available after winding-up; and that for the purpose of ascertaining such assets it is quite immaterial whether the company originally possessed them by way of capital or profits. The liquidator may apply sums earned as profits in paying capital liabilities and capital assets in paying revenue liabilities. What he distributes is a lump sum, and no reconstruction

into a division of capital and profits is necessary or in many cases possible. The position in respect of a partnership is different. The profits are the profits of the partners, joint in the first instance, and if the appropriate statute so provides assessable as joint: but in fact representing an interest of each partner: and as soon as declared constituting an obligation from the firm to each partner. If the Ceylon ordinance be analogous to the English Act there would be no doubt that up to May 1930, the respondent would have been assessable income tax jointly and to surtax severally on the amount of the profits in question. And if in fact instead of being left in Colombo undrawn, the sums in question had before May 1930, been remitted to the respondent in India no question would have arisen as to his having been assessable under the India Act on those sums. Being profits of the respondent up to May 31, 1930, how did they alter their character by dissolution? The account taken on dissolution ascertains what is due to the partners for profits, and what is due for capital. It can hardly be suggested that the partners share according to their capital proportions in the whole assets of the partnership. This sum due for undrawn profits was and remains a sum due by the partners to each partner: and necessarily ranks first before the sums due for capital can be distributed. In other words, on dissolution of a partnership an outgoing partner has the right to receive not as in the case of a share-holder in winding-up a company only a share of the assets: but to receive payment of his profits, profits which were his before dissolution and do not cease to be his on dissolution. In their Lordships' opinion, the respondent received this payment in India as a payment of profits and was properly assessed. Counsel for the respondent pointed out that the contention of the Commissioner in this case was the contrary of that made by him in the previous case in Madras which was successful in the High Court. He protested strongly against the Commissioner in successive cases blowing hot and cold. But that is a privilege not confined to Commissioners of Income Tax and its exercise cannot influence judicial determination of the law. Their Lordships think it desirable to point out that their decision does not cover cases where undrawn profits have, with the consent of all parties, been invested in the business so as to increase the capital account, a position which does not arise here. Nor have they had to consider any special provisions of partnership articles which might affect the matter: for there were none in this case. For the reasons given they are of opinion that this appeal should be allowed, the order of the High Court dated April 27, 1934, should be set aside and the question referred to the Court by the Commissioner should be answered that the sum of Rs. 38,305 is a receipt of profits assessable under Section 4 (2) of the Income Tax Act. The respondent must pay the costs here and in the High Court.

Their Lordships will so humbly advise His Majesty.

Appeal allowed.

Solicitors—Solicitor, India Office, for the appellant.
Solicitors—Douglas, Grant and Dodd, for the respondent.

[IN THE LAHORE HIGH COURT.]

HUKAMCHAND JAGADHARMAL

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Din Mohammad, JJ.

April 1, 1935.

BAD DEBT—QUESTION WHETHER A DEBT IS A BAD DEBT AND WHEN IT BECAME BAD—FINDING OF INCOME TAX AUTHORITIES HOW FAR FINAL—QUESTION WHETHER THERE IS SUFFICIENT EVIDENCE TO SUPPORT FINDING—QUESTION OF LAW—REFERENCE—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 66 (3).

Though whether a debt is a bad debt and if so at what point of time it became a bad debt are questions of fact to be decided in the event of a dispute by the appropriate tribunal and not by the ipse dixit *of any one else, yet the conclusions of the appropriate tribunal must be based on relevant and admissible evidence and the question whether there is such evidence to support the conclusions arrived at by the income tax authorities is a question of law open to consideration by the High Court.*

COMMISSIONER OF INCOME TAX, CENTRAL AND UNITED PROVINCES *v.* SIR S. M. CHITNAVIS [1932] (59 I. A. 290; 28 N. L. R. 205; 1932 COMP. CAS. 464; 1932 A. L. J. 647; 34 Bom. L. R. 1071; 36 C. W. N. 697; 137 I. C. 772; 63 M. L. J. 361; A. I. R. 1932 P. C. 178) *explained.*

Application under Section 66 (3) of the Indian Income Tax Act, XI of 1922, to direct the Commissioner of Income Tax, Punjab and N. W. F. P., to refer certain questions of law to the High Court, [Mis. No. 783 of 1934].

Shamair Chand, for the assessee.

S. M. Sikri for *Jagannath Aggarwal*, for the Crown.

ORDER.—This is an application under S. 66 (3) of the Indian Income Tax Act which has arisen in the following circumstances.

On the 2nd December, 1921, the assessee advanced a loan of Rs. 45,000 to one Sheikh Siraj Din on the security of both his person and property. In 1924 he instituted a suit for recovery of the amount due which was decreed on the 19th December, 1925. In execution of this decree certain sums were realised leaving a balance of Rs. 26,721 on the 7th April, 1929. The judgment-debtor preferred an appeal to this Court against the order of the

Senior Subordinate Judge allowing the mortgagee to proceed against the mortgagor's person, in case the net proceeds of the sale of the mortgaged property were found insufficient. On the 7th March, 1928, the assessee obtained a personal decree against the mortgagor. The mortgagor's appeal to the High Court was dismissed on the 25th November, 1931. In the meanwhile the assessee had left no stone unturned to secure further satisfaction of his decree but to no avail. Treating the debt as irrecoverable he wrote off the amount and claimed deduction on this score in the return submitted by him. The Income Tax Officer disallowed the deduction on the ground that the debt had become irrecoverable long before the account year. The assessee appealed to the Assistant Commissioner of Income Tax who upheld the conclusion arrived at by the Income Tax Officer but on the ground that the claim was premature as the debt had not become irrecoverable till then. The assessee moved the Commissioner who in effect restored the finding of the Income Tax Officer. Dissatisfied with this finding the assessee applied to the Commissioner under Section 66 (2) requiring him to refer to the High Court the question of law arising out of the order of the Assistant Commissioner. The Commissioner has refused to state the case on the ground that no question of law arises.

We may say at once that we are not satisfied with the correctness of the Commissioner's decision. It is no doubt true that the entire mortgaged property had been sold in 1929 and that three years later even the mortgagor himself was reported to be absconding, but these circumstances alone may not be sufficient to draw an inference that the debt is bad. During the account year the mortgagor was still contesting his personal liability in the High Court and as remarked above, his appeal was not disposed of until November 1931. In these circumstances the assessee's claim should not have been thrown out in this summary manner.

On behalf of the Commissioner reliance is placed on the following observations of their Lordships of the Privy Council in *Commissioner of Income Tax, Central and United Provinces* v. *Sir S. M. Chitnavis*. "Whether a debt is a bad debt and if so at what point of time it became a bad debt, are questions of fact to be decided in the event of a dispute by the appropriate tribunal and not by the *ipse dixit* of any one else." This is no doubt so, but the conclusions of the appropriate tribunal must be based on relevant and admissible evidence and the question whether there is such evidence to support the conclusions arrived at by the income-tax authorities will still remain a question of law open to consideration by this Court. We, therefore, require the Commissioner to state the case and refer it to this Court. The question that we formulate is, whether there is any relevant and admissible evidence to support the conclusion that the sum of Rs. 26,721 became a bad debt in 1929. Costs will abide the event.

Petition allowed.

[IN THE RANGOON HIGH COURT.]

COMMISSIONER OF INCOME TAX, BURMA

v.

DEY BROTHERS.

Page, C.J., Mosely and Ba U, JJ.

January 29, 1935.

NOTICE—SERVICE ON CLERKS OR EMPLOYEES OF MANAGER OF BUSINESS—WHETHER SUFFICIENT—KNOWLEDGE OF ASSESSEE, EFFECT OF —NECESSITY OF DUE SERVICE—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 22 (2), 63 (1)—CIVIL PROCEDURE CODE (ACT V OF 1908), ORDER 5, RULES 9 AND 13 (1).

The assessee who resided at Calcutta owned a business at Rangoon styled Dey Brothers. This business was carried on by one D who had been appointed as manager by the assessee. A process issued by the Income Tax Officer in connection with the assessment of the business was served during the absence of D on M, one of his assistants working in the shop, who signed on the back of the copies 'for Dey Brothers' under a rubber stamp. The question being whether there was sufficient service of the notice :

Held, (i) *That the mere fact that the notice had in some way or other reached the person upon whom it was to be served was not sufficient but there must be service as prescribed in Section 63 (1) of the Income Tax Act;*

(ii) *That as D alone was the manager or agent of the assessee the notice should have been served on him;*

(iii) *That neither the fact that M had accepted previous notices nor the fact that according to the practice obtaining in the business the employees were expected to hand over all communications to the manager was sufficient evidence to support a finding that D had been duly served.*

Reference made by the Commissioner of Income Tax, Burma, under Section 66 (2) of the Indian Income Tax Act, 1922. [Civil Reference No. 120 of 1934].

The facts are stated in the judgment.

A. Eggar, for the Commissioner of Income Tax.

K. C. Bose, for Dey Brothers.

PAGE, C. J.—In this case the question that has been referred for our determination is :

" Whether there were materials before the Income Tax Officer upon which he could conclude that the assessee had failed to comply with the terms of a notice issued under sub-Section (4) of

Section 22, or with the terms of a notice issued under sub-Section (2) of Section 23 of the Income Tax Act."

It appears that the assessee L. M. Dey carries on a chemist and druggist business at 32, Mogul Street, Rangoon, under the style of Dey Brothers. L. M. Dey acquired the business in January 1932. He lives in Calcutta and the business at Rangoon is carried on by one S. M. Dutta, who was appointed by the assessee as the manager of the Rangoon business in March 1932. The assessment under consideration is for the year 1931-32. On August 8, 1932, notices under Sections 22 (2) and 23 (4) were issued by the Income Tax Officer. They were taken by the process server to 32, Mogul Street, and were delivered to one J.C. Mazumdar, an assistant in the shop, who signed on the back of the duplicate copies "for Dey Brothers" under a rubber stamp.

Under Section 63 (1), Income Tax Act (XI of 1922), "a notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a Court, under the Code of Civil Procedure of 1908."

The Commissioner of Income Tax stated in the case that he has expressed the view that so long as it was found that the notice in some way or other reached the person upon whom it was to be served there was sufficient compliance with the terms of Section 63 (1). In my opinion such a contention is not in accordance with the provisions of this section, under which it is prescribed that a notice or requisition under the Act may be served in one of two alternative ways, either by post or in the manner prescribed for service of a summons under the Code of Civil Procedure. *Ex concessis* these notices were not served by post, and the question that falls for determination is whether there was material before the Income Tax Officer to justify him in finding that the notices were served in the manner prescribed for the service of a summons under the Code of Civil Procedure. For this purpose it is necessary to have recourse to Order V, Rules 9 and 13, which run as follows :

"Rule 9. (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates."

"Rule 13. (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service."

Now, it is common ground in the present case that S. M. Dutta and no one else was the agent of the assessee resident within the jurisdiction who was empowered to accept service of the summonses, and that Dutta alone was the manager or agent of the assessee who at the time of service was personally carrying on the business of Dey Brothers at 32, Mogul Street. Inasmuch as the assessee was living at Calcutta, in order that these summonses should have been duly served in the circumstances of the present case, such of them must have been served upon S. M. Dutta. That is a question of fact; and the Commissioner of Income Tax is of opinion that S. M. Dutta was duly served because this Mazumdar had acknowledged a previous notice which was complied with, a subsequent notice was acknowledged by another employee although the manager was present, and that this employee stated that the practice was for the employee to accept notices.

Now, it is common ground that when the two summonses under consideration were delivered at 32, Mogul Street, the manager, S. M. Dutta, was not present, and that they were delivered to and taken in by J. C. Mazumdar, one of the assistants working at the shop. There was evidence that each and every one of the clerks and assistants in the shop used to accept communications addressed to the firm. The question is whether in such circumstances there was evidence to justify the conclusion that S. M. Dutta was served with the summonses in question. In my opinion there was not. It is not pretended that S. M. Dutta was present, or had any personal knowledge of the delivery of either of the notice to J. C. Mazumdar, or that J. C. Mazumdar or any of the clerks or assistants in the firm were persons authorised to accept service of notices within Order V, Rule 9 and or Rule 13. The problem therefore has resolved itself to this fine point; whether where a notice under the Income Tax Act is delivered otherwise than by post to any clerk or servant on the premises where the assessee carries on business, and according to the practice obtaining in the business the employee is expected to hand over any communication which he has received to the manager, that is evidence upon which the income tax authorities can find as a fact that the manager was served with the summons. I have no doubt that is not; for if we were to hold that it was, it would follow that merely because a process server happens to hand over a notice to a *durwan* or it might be to a *chaprasi*, that would be evidence that the person under whom the *durwan* or the *chaprasi* was serving had received the notice himself. In my opinion an inference to that effect could not be founded upon such evidence. For these reasons, in my opinion, the question propounded should be answered in the negative. The Rs. 100 may be refunded but we make no order as to costs.

MOSELY, J.—I agree.

BA U, J.—I agree.

Question answered in the negative.

[IN THE PATNA HIGH COURT.]

COMMISSIONER OF INCOME TAX, BIHAR & ORISSA

v.

MAHARAJA VISWESWAR SINGH.

Courtney-Terrel, C. J., Mohammad Noor and Agarwala, JJ.

April 11, 1935.

IMPARTIBLE ESTATE—ALLOWANCE PAID TO JUNIOR MEMBER —WHETHER ASSESSABLE IN MEMBER'S HANDS—HINDU UNDIVIDED FAMILY—SUMS RECEIVED "AS A MEMBER," INTERPRETATION OF—BURDEN OF PROOF OF EXEMPTION FROM TAX—INTERPRETATION OF INCOME TAX ACT—PRINCIPLES—INDIAN INCOME TAX ACT (XI of 1922), SECTION 14 (1).

By an indenture the Maharaja of Darbhanga, the elder brother of the assessee, made a babuana (*maintenance*) *grant to the assessee consisting of a number of villages in consideration of the assessee renouncing and relinquishing all claims to any of the properties of the late Raja, the assessee's father. In the lifetime of the late Maharaja the assessee had been receiving from the Raj an allowance of Rs. 38,000 a year and the present Maharaja made an allowance of Rs. 48,000 per year to the assessee in addition to the* babuana *grant. The question being whether this sum of Rs. 48,000 was taxable as income of the assessee :* Held, *that the assessee and the Maharaja were members of a joint Hindu family and as the allowance in question was paid to the assessee out of the joint family property it was not assessable to income tax in the assessee's hands in view of the provisions of Section 14, sub-section (1), of the Indian Income Tax Act.*

The Indian Income Tax Act clearly contemplates that in the case of members of joint Hindu family the unit of taxation shall be the family itself and not each individual member.

Although the burden is on the revenue authorities to show that income which is sought to tax is income which it is rendered liable to be taxed by the Statute, the onus of showing that a particular class of income is exempt from the taxation lies on the assessee.

There is no presumption in favour of the exemption of the few from the incidence of a general tax. The presumption is for equality and rather against the partiality which is involved in special exemptions.

In the case of an impartible Raj, the fact that the holder for the time being is exclusively entitled to the estate is not inconsistent with other members of the family being joint with him.

Once it is shown that the custom prevailing in a family does not negative the right of the junior members of the family to maintenance, their right to maintenance out of an impartible estate must

be held to be based upon the joint ownership of the junior members of the family.

In one sense it is true that a taxing Statute should be construed literally and favourably to the subject, but, on the other hand, equality and impartial justice in the incidence of taxation are of greater moment and the statute should be construed so as to promote that equality and that impartiality of justice.

Cases referred to:

COLQUHOUN *v.* BROOKS [1889] (14 A. C. 493; 2 Tax Cas. 490).

COLLECTOR OF GORAKHPUR *v.* RAM SUNDAR MAL [1934] (61 I.A. 286; I.L.R. 56 All. 468; 150 I.C. 545; 36 Bom. L.R. 867; 38 C.W.N. 1101; 67 M.L.J. 274; 1934 A.L.J. 779).

COMMISSIONER OF INCOME TAX, MADRAS *v.* SRI RAJA VYRICHERLA NARAYANA GAJAPATHI RAJU BAHADUR GARU [1931] (I.L.R. 57 Mad. 1023; 151 I.C. 926; 67 M.L.J. 306; A.I.R. 1934 Mad. 608; *2 I.T.R. 288*).

COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA *v.* MAHARANI LAKSHMIBATHI SAHEBA [1935] (16 P.L.T. 171; 154 I.C. 866; A.I.R. 1935 Pat. 8; *3 I.T.R. 49*).

SCOTTISH WIDOW'S FUND AND LIFE ASSURANCE CO., *In re* [1888] (1 Tax Cas. 10).

YOUNG, *In re* [1888] (1 Tax Cas. 59).

Miscellaneous Judicial case forwarded by the Commissioner of Income Tax, Bihar and Orissa, on June 29, 1934, regarding assessment of Income tax on *Maharajadhiraja Kumar* Visweswar Singh of Darbhanga, under Section 66 (2) of the Indian Income Tax Act, XI of 1922. [Mis. Jud. Case No. 54 of 1934].

Manohar Lal, for the petitioner.

K. P. Jayaswal, Murari Prasad, R. Misra and *Bisheswar Prasad Sinha*, for the opposite party.

COURTNEY-TERRELL, C. J.—I have read the judgment prepared by my brother Agarwala. I entirely agree and have nothing to add.

MOHAMMAD NOOR, J.—I have also read the judgment prepared by my brother Agarwala. I entirely agree with it.

AGARWALA J.—The assessee is the younger brother of the present holder of the Darbhanga *Raj* which is an impartible estate. By an indenture executed soon after the death of the late Maharajadhiraja the assessee's brother made a *babuana* grant in favour of the assessee in accordance with the custom prevailing in the Darbhanga *Raj*. The grant consisted of a number of villages

yielding an income of about five lakhs of rupees per annum. The indenture stated that in consideration of this grant, the grantee renounced and relinquished all claims to any of the properties movable or immovable, ancestral or self-acquired, possessed and held by his late father. It appears that in the lifetime of his father, the assessee had received from the former an allowance of Rs. 38,000 a year. The present Maharaja makes an allowance of Rs.49,000 per annum to the assessee in addition to the *babuana* grant. The question which has been referred for our opinion is whether the assessee is taxable in respect of this Rs. 48,000. The question has been argued with reference to the terms of the first sub-section of Section 14 of the Income Tax Act, 1922. Section 3 of that Act provides that income tax shall be charged in respect of all income, profits and gains of every individual, Hindu undivided family, company, firm and other association of individuals. For the purpose of the Act, Section 2 (9) enacts that "person" includes a Hindu undivided family, and for the purposes of proceedings under the Act a Hindu undivided family is treated as a unit for the purposes of taxation. In the third sub-section of Section 4 of the Act are enumerated certain classes of income which are exempt absolutely from the operation of the Act. The classes of income included in this sub-section are not taken into consideration either for the purpose of ascertaining the amount of the taxable income or the rate at which the tax is to be levied. The Act also provides other exemptions of a rather different nature, for example, Section 15 exempts sums payable by an assessee in respect of an insurance on his own life or on the life of his wife, and Section 14 (2) exempts from taxation in the hands of an individual dividends which have already been assessed to taxation in the hands of a company and the profits or gains of a firm which have already been assessed to income tax in the hands of a firm. These exemptions, however, unlike the exemptions referred to in the third sub-section of Section 4 are taken into consideration in ascertaining the total income of the assessee which determines the rate at which he is liable to be taxed (Section 15) and the amount of super-tax which is payable by him (Sections 55 and 56). There in a third exemption provided by the Act which differs both from the exemptions granted by Section 4 (3) and by Section 14 (2) and that is the exemption granted by the first sub-section of Section 14 in respect of any sum which the assessee receives "as a member of a Hindu undivided family". This differs from the exemptions mentioned in the second sub-section of Section 14 in this respect that a sum received by an assessee as a member of a Hindu undivided family is exempt from taxation in his hands whether or not it has already been taxed in the hands of the family. It differs from the exemptions granted by the third sub-section of Section 4 inasmuch as the income referred to in that sub-section is not taxable at all while the income of a Hindu undivided family is taxable in the hands of the family.

As has already been observed, the assessee's claim to exemption has been argued on the basis of the provisions of the first sub-section of Section 14. It is well established that although the burden is on the Revenue Authorities to show that income which it is sought to tax is income which is rendered liable to be taxed by the Statute, the onus of showing that a particular class of income is exempt from taxation lies on the assessee. As was observed in *In re Scottish Widows' Fund and Life Assurance Co.* (1 Tax Cas. 10) in one sense it is true that a taxing Statute should be construed liberally and favourably to the subject, but, on the other hand, equality and impartial justice in the incidence of taxation are of greater moment and the Statute should be construed so as to promote that equality and that impartiality of justice. There is no presumption in favour of the exemption of the few from the incidence of a general tax. The presumption is for equality and rather against the partiality which is involved in special exemptions; (see also *In re Young* page 61 per Lord Deas and page 62 per Lord Macmillan). In the present instance the Revenue Authorities discharged the onus which lay upon them by showing that the assessee is in receipt of income. When that has been established, Section 3 of the Act renders that income liable to taxation. It is for the assessee to prove that the income which he is in receipt of is exempted from taxation by the Act. For the purposes of Section 14 (1) what he has to show is (*a*) that he is a member of a Hindu undivided family and (*b*) that he receives the income in question as a member of that family. The Commissioner of Income Tax states, "for the purposes of income tax which is tax on income, a family governed by the law of primogeniture cannot be a joint family as the income is enjoyed by one particular member to the exclusion of others. In this case the assessee comes from a family governed by the rule of primogeniture. Subject to this the family belongs to the *Mitakshara* School of Hindu Law............ The assessee in no sense can be held to be a member of the Hindu undivided family of his brother in respect of the property held by the latter as the assessee has no share in that property during the life time of the present incumbent, or even later if he dies leaving a child." The question whether a person is or is not a member of a joint undivided family is one of fact, but when the tribunal of fact states the circumstances on which it relies for its finding and those circumstances do not in law lead to the conclusion arrived at by the tribunal of fact, it is open to a Court of law to draw the proper inference from the circumstances stated. It is now well established that in the case of an impartible *Raj* the fact that the holder for the time being is exclusively entitled to the estate is not inconsistent with other members of the family being joint with him: [see *Collector of Gorakhpur* v. *Ram Sunder Mal*]. The assessee in the present case asserted that he was joint with his brother and this assertion is not controverted by the Commissioner except in so far as is follows from the view he took of the law governing

impartible estates, but which is unsustainable in view of the authorities. It must, therefore, be taken that the assessee is joint with his brother.

The next and the more difficult question which arises for decision is whether the assessee receives the sum which is sought to be taxed as a member of the undivided family. It was sought to raise this question in the case of *Commissioner of Income tax, Bihar and Orissa* v. *Maharani Lakshmibati Saheba* but the assessee was held not to have agitated before the Revenue Authorities the facts necessary for its decision. There are, however, observations in the judgment in that case, the effect of which may be shortly stated to be that the first sub-section of Section 14 applies only to sums received by a member of a Hindu undivided family out of income to a share in which he has a vested right, that is to say, sums which he receives from the joint income of the family. A further consideration of the question has not led me to doubt the correctness of the view taken in that case. The material words of S. 14 (1) are "as a member of a Hindu undivided family". It is contended that these words must be construed in a strictly literal sense and that in that sense they refer to any sum received by a member of an undivided family because he is a member of the family. There are, indeed observations of RAMESAM J., in *Commissioner of Income tax, Madras* v. *Sri Raja Vyricherla Narayana Gajapathi Raju Bahadur Garu* which support this view. It has been contended that a sum received by an assessee because he is a member of an undivided family is on the same footing as a sum received as a member of the family within the meaning of Section 14 (1). In the judgment in that case there is no reference to other sections of the Act which in my opinion, have a bearing on the correct construction of these words and without considering which it is not possible to arrive at the true intention of the Legislature. Nor were the observations relied on necessary for the determination of the question referred to the High Court which was:

"Whether the sum of Rs. 6,000 received as maintenance by the petitioner as a brother of the late Raja of Kurupam entitled under the law to receive maintenance out of the ancestral impartible estate of Kurupam is a sum received by him as a member of a Hindu undivided family within the meaning of Clause (1) of Section 14 of the Act".

The question so framed pre-supposes that the sum in dispute was paid out of ancestral property and the only question before the Court was whether, when an estate has acquired the attribute of impartibility, it continues to be the joint property of the family. On a review of the decisions of the Privy Council, RAMESAM, J., held:

"The right to maintenance which the son of a *zamindar* still

possesses is not the creature of custom but it is an incident to the ordinary joint family property which was left untouched by custom, despite its encroachment on the other incidents".

Once it is shown that the custom prevailing in a family does not negative the right of the junior members of the family to maintenance, their right to maintenance out of an impartible estate must be held to be based upon the joint ownership of the junior members of the family: See *Collector of Gorakhpur* v. *Ram Sundar Mal* (per Lord Dunedin).

In the present case, of course, the family custom does entitle the junior members to maintenance so that in so far as maintenance is paid out of joint family property, the recipient receives it as a member of the family by virtue of his right to it and it is exempted from the taxation by Section 14 (1). But the further question whether the recipient would receiv it is "as a member" of the family if it were not paid out of joint family property still remains. A definite illustration, will, I think, bring out the anomaly of holding that a sum received because a person is a member of an undivided family is the same thing as a sum received as a member of the family.

(1) X, feeling himself to be under an obligation to a certain family, makes a regular allowance to a member of the family who is in distressed circumstances.

The illustration premises that the allowance is made because the recipient is a member of the family to which X considers himself to be under an obligation. Is it arguable that the recipient receives it "as a member of the family" within the meaning of Section 14 (1)?

(2) Y, the *karta* of an impoverished undivided family, is himself the possessor of a substantial income from self-acquired properties. Out of this income he makes regular allowances to some of the members of the family.

Here, again, it may reasonably be assumed that Y makes the allowances because the recipients are members of the family, but I am unable to appreciate what difference there is in principle between the two cases.

To me it seems impossible to ascertain what is meant in this section by these words without considering the scheme of the statute with respect to the taxation of Hindu undivided families.

As was pointed out by Lord Herschell in *Colquhoun* v. *Brooks*, the Court is entitled and, indeed bound, when considering the terms of any provision in the statute, to consider any other parts of the Act which throw light upon the intention of the Legislature and which may serve to show that the particular provision ought not to be considered as it would be, if considered alone and apart from the rest of the Act. It has been shown that the general scheme of the Act is to tax all income which is not excluded from

the operation of the Act by Section 4 (3) and not to tax in the hands of an assessee income which has accrued to him and which has already been taxed in the hands of a company or firm. The Act clearly contemplates that in the case of members of a joint Hindu family the unit of taxation shall be the family itself and not each individual member, *i.e.*, the entire joint income of the members of the family is taxable only in the hands of the family and no part of it is taxable in the hands of its individual members. In my opinion, this provides the clue to the meaning of the words "as a member of a Hindu undivided family" in Section 14 (1). That sub-section exempts from taxation in the hands of a member or a family, income which is liable to taxation in the hands of the family, whether in fact it has been so taxed or not. It follows from this view of the matter that the burden is on the assessee to show that the sum in respect of which he claims exemption is assessable in the hands of the family. It was suggested that the practical difficulty of proving that a sum received by a member of a family has been paid out of the joint family property indicates that it could not have been the intention of the Legislature to lay this burden on him. I see no more difficulty in proving the source from which a payment is made than in proving many other facts which arise in the course of an assessment or litigation. In the present case the assessee relied on a certificate of the manager of his brother's estate to prove that he has remained joint with his brother since the latter succeeded to the *Raj* and that the allowance was paid out of *zamindari* income. It was no more difficult for him to have produced the manager as a witness to state whether the allowance was paid from joint income or from the self acquired properties (if any) of the Maharajadhiraj. It is not easy to conceive a case in which the *karta* of a joint family, who is paying a maintenance allowance to a member of the family, would not be willing to appear before the income tax authorities and state the source from which the allowance is paid. And if he maintains separate accounts for the joint income of the family and his own income from self-acquired properties, his testimony, supported by such evidence, would be irresistible. In the statement of the case, the Commissioner of income tax states that the assessee's contention was that the "Rs. 48,000 which he received in addition to the *babuana* grant was made as a sort of maintenance allowance paid to a member of a joint family out of the joint family property." The Commissioner has rejected this contention on two grounds, apart from his finding that the assessee is not joint with his brother. Those two grounds are, first, that the allowance is not a maintenance allowance but something in addition to the maintenance allowance fixed by the indenture, and secondly, that it is not shown that the allowance is paid to the assessee from *zamindari* income. He has not controverted the assessee's assertion that the allowance is paid out of joint family property. Whether the allowance is paid out of *zamindari* income or from other sources available to the holder of

the *Raj* is immaterial for the decision of the present question. If the allowance is paid out of joint family income it is exempt from taxation by reason of the provision of Section 14 (1). I desire to make it clear that I am expressing no opinion on the question whether an allowance paid to a member of an undivided family and not exempted from assessment by Section 14 (1) may not be exempt on some other ground. For the purposes of this reference it is sufficient to say that the Commissioner's reasons for holding that the assessee is not a member of a joint Hindu family being unsustainable in law, and the assessee's contention that the allowance is paid to him out of joint family property being uncontroverted in fact, I would answer the question referred to us by saying that the cash allowance of Rs. 4,000 a month which the assessee receives from his brother, the Maharajadhiraja of Darbhanga, is not assessable to income tax in the hands of the assessee.

The assessee is entitled to costs. He will be refunded the deposit of Rs. 100. Hearing fee 15 gold *mohurs*.

Reference answered accordingly.

[IN THE MADRAS HIGH COURT.]

COMMISSIONER OF INCOME TAX, MADRAS

v.

B. J. FLETCHER.

Beasley, C. J., Cornish and Pandrang Row, JJ.

April 24, 1935.

'SALARIES'—OFFICER'S RETIRING FUND—BONUSES CREDITED TOWARDS FUND HALF-YEARLY AND ACCUMULATED—ACCUMULATED SUM DISTRIBUTED ON RETIREMENT, WHETHER ASSESSABLE AS 'SALARY' OR EXEMPT FROM TAX—'INCOME', 'SALARY,' 'PENSION' MEANINGS OF—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 7 (1), 4 (3) (*v*) AND (*vii*).

A limited company created a fund called the Officer's Retiring Fund, and its constitution and management were regulated by certain rules which the directors had full discretion to alter. Every half-year a certain sum called 'bonus' by the company was allotted by the company to the credit of this fund and this sum was invested and accumulated at the discretion of the directors of the company. This half-yearly allotment was divided amongst the several officers of the company eligible to the benefit of the fund in proportion to their salaries and credited half yearly to the accounts maintained in the names of the several officers. Each officer was given a pass book in which were entered the amounts so credited to his account. The proportionate interest realised on the investments was also credited to this account. No officer had any claim on the

company in respect of the amount standing to his credit until he had served for a prescribed period and the amount was not payable until the officer left the service of the company. An officer of the company had to his credit on this account a sum of Rupees 36,794-3-2 on his retirement and the company paid him the amount. The question being whether this sum was liable to be taxed:

Held, *per* Cornish & Pandrang Row, JJ.—(Beasley, C. J. dissenting) *that the contributions made by the company to the credit of its officers in the fund was not part of the officers' salaries, nor gratuity or profit received in lieu of or in addition to salary. The sum in question was in substance a lump sum paid in lieu of pension, that is, in consideration of past services. It was not 'income' at all as it was not of the nature of a periodical return but a unique receipt and was not taxable.* Held further, per Pandrang Row, J.—*that under the rules there was a trust in favour of the employees admitted by the company to the benefit of the fund and the payment made by the company was not made as an employer but as trustee.*

Beasley, C. J. (contra).—*The amounts contributed by the company half-yearly must be regarded as sums set apart periodically in respect of present services rendered by the officers in addition to salary within Section 7 (1) of the Income Tax Act, and allowed to accumulate and paid in a lump on retirement. It was an accumulation of bonuses and not a sum paid in commutation of pension.*

Per Beasley, C. J., Cornish and Pandrang Row, JJ.—*Section 25 (3) of the Income Tax Act is intended to apply only to cases in which there has been a double assessment to tax in the year 1922-23 as a result of the change in the law brought about by the Act of 1922; further, it applies only to profits from professional earnings and has no application to salaries.*

Cases referred to:

COMMISSIONER OF INCOME TAX, BENGAL *v.* SHAW WALLACE & Co. [1932] (59 Cal. 1343; 136 I. C. 742; 1932 Comp. Cas. 276; 5 I.T.C. 211).

COMMISSIONER OF INCOME TAX, BURMA *v.* RANGOON ELECTRIC TRAMWAY AND SUPPLY CO., LTD. [1933] I.L.R. 11 Rang. 70; 142 I.C. 239; 1933 I.T.R. 313).

MUNICIPAL COUNCIL, SALEM *v.* GURU RAJA RAO [1934] (68 M.L.J. 118).

NACHIAPPA CHETTIAR *v.* COMMISSIONER OF INCOME TAX [1933] (I.L.R. 56 Mad. 679; 145 I.C. 989; 1933 I.T.R. 241).

RUTHERFORD *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA [1931] (I.L.R. 12 Pat. 315; 133 I.C. 360; 3 I.T.C. 214).

SEYMOUR v. REED [1927 A. C. 554].

Case stated by the Commissioner of Income Tax, Madras under Section 66 (2) of the Indian Income Tax Act [O. P. No. 27 of 1935].

The necessary facts are stated in the judgment.

T. M. Krishnaswamy Ayyar and *M. A. Venkataramanujam*, for the assessee.

M. Patanjali Sastri, for the Commissioner of Income Tax.

JUDGMENT.

THE CHIEF JUSTICE.—Two questions are referred to us by the Income Tax Commissioner, *viz.*,

(1) "Whether the sum of Rs. 36,794 paid to Mr. Fletcher in 1932-33 was income liable to tax, or was a capital sum exempted under Clause (v) of sub-Section (3) of Section (4) or otherwise, and

(2) "Whether Mr. Fletcher is entitled to relief under Section 25 (3) of the Act on the ground alleged by him, *viz.*, that he discontinued his profession in the year of account."

The sum set out in the first question was received by the assessee in the year of account as an employee of the Buckingham and Carnatic Company Limited, Madras, over and above his monthly pay. This sum was received out of the Officers' Retiring Fund of the Company. It is a fund created by the company and its constitution and management are governed by certain rules framed by the company and the directors of the company for the time being have full discretion to alter, interpret or add to those rules which are before us. The company allots every half year a certain sum to the credit of this Fund and this sum is invested and accumulated at the discretion of the directors of the company. The half yearly allotment is divided amongst the several officers of the Company eligible to the benefits of the Fund in proportion to their salaries and credited half-yearly to accounts maintained in the name of the several officers. Each officer is given a pass book in which are entered the amounts so credited to his account with the Fund. The proportionate interest realised on the investments is also credited to this account. No officer admitted to the benefits of the Fund has any claim on the Company in respect of the amount shown at the credit of his account until he shall have previously served the company continuously and satisfactorily for a prescribed period (six years in the case of the petitioner) (*sic*) and in no case can the amount to the credit of an officer become payable to him until he leaves the service of the company. The Directors of the Company have full discretion to decide which of the Officers of the Company shall from time to time be eligible to the benefits of the Fund. They have full power to dispense with the services of or dismiss any such officer and such persons

have no claim against the Fund if they have not served for the prescribed period. The amount allotted each half year to the credit of the Fund is not treated as expenditure incurred by the company for the purposes of its assessment; but any amount paid out of the Fund to an employee in account with the Fund at the time of his retirement is treated as expenditure incurred by the company in the year of payment for the purposes of its assessment. The amount credited each half year to the account of the assessee was not treated by him as his income of that year in any of the returns filed by him nor was it ever assessed to tax as income of any year prior to 1932-33. As before mentioned the total amount to the credit of the assessee's account with the Fund on the date of his retirement was Rs. 36,794-3-2. This amount was paid to him by the company on the 29th March, 1933, after deducting Rs. 6,496-7-0 on account of income tax under Section 18 (2) of the Act.

It was contended on behalf of the assessee that this was not a payment of gratuity coming under the head of 'Salaries' in Section 7 (1) of the Income Tax Act. This payment was variously described by learned Counsel for the assessee as a gift, as being akin to commuted pension or a windfall. In my opinion, this is in no sense a gift because provided that the officer has fulfilled the conditions laid down in the rules, on his retirement he has a legal claim to the amount standing to his credit; nor, in my opinion, can it be described as being in the nature of a windfall such as the payment was held to be in *Commissioner of Income Tax, Bengal* v. *Messrs. Shaw Wallace & Co.*, I. L. R. 59 Cal. 1343, where the Company on the termination of an agency received a sum of money to compensate them for its cessation and that sum was held not to be taxable income under Section 6 (iv) (business) nor under Section 6 (vi) (other sources). The case most favourable to the assessee is *Rutherford* v. *Commissioner of Income Tax, Bihar and Orissa*, I. L. R. 10 Pat. 315. The facts in that case were that it had been the custom of the Bettiah Raj under the management of the Court of Wards to grant a lump sum to his managers when they laid down their office. This practice had been sanctioned by the Government in the cases of successive managers and it was one of the inducements offered to candidates for the office. It was recognised that there was no legal obligation upon the Raj or the Government to make the payment but having regard to the established practice it was nevertheless a matter of reasonable expectation and incentive to accept an onerous office at a comparatively small salary and to perform the duties in an efficient manner. In pursuance of this practice, Mr. Rutherford received a sum of Rs. 75,575 which the income tax authorities ought to assess, but it was held that the sum was in the nature of commuted pension falling within Section 4 (3) (v) of the Act and was exempt from taxation, the contention for the Crown having been that the sum paid was a

gratuity and not a pension. The learned Chief Justice says at p. 318:

"The candidate, therefore, enters upon his office under the Court of Wards with a definite salary and the expectation that he will receive at the end of his service the equivalent of a pension but he knows that he will not after his retirement be given a series of periodical payments but in lieu thereof he will get a lump sum. In other words he is to get a pension which will certainly be commuted."

It was found as a fact that, if it were not for the expectation of this gratuity, the Court of Wards would have to pay higher salaries to the officers and further;

"No doubt the Court of Wards do not pay pensions or guarantee gratuities but allow a gratuity in each case as an act of grace. But it is none the less true that the Court of Wards do invariably pay gratuities to their deserving servants on retirement."

It is pointed out in the judgment that it was not possible for the Court of Wards or the Government to offer the candidate a pension consisting of periodical payments because the payment might be repudiated by the owners after the estate was released from the management of the Court and that therefore the practice had been established of treating officers of the Court, if the finances of the State permitted, in the same manner as Government servants and of paying to them a sum equal to that payable as commutation of pension on the scale set forth for such commutation appended to the Civil Service Regulation plus in very meritorious cases one fourth of such amount. The facts are different here. But it remains to be seen whether the dissimilarity really makes any difference. In that case, the payment was allowed as an act of grace. In the present case, it is not an act of grace at all but the company by its rules binds itself, subject to conditions, to pay an amount, although not specified, to its officers who come under the rules provided that they fulfil the conditions, on retirement. Moreover, there is no indication here, as far as I am able to see, that the sum payable is based on any scale for the commutation of pensions such as there was in *10 Patna Case*; and there is this fact also that in the rules the sums allotted half-yearly by the company to the credit of the Fund are described as bonuses and they are apportioned as between the officers of the company. Throughout the rules the sums are described as bonuses and ultimately the company is to pay to the officer 'the aggregate amount of his share in the various bonuses that may have been credited to the fund by the company during the period of his service with the company; whereas there there was no such periodical allotment of sums to the managers in the *10 Patna Case*; and it is of course quite clear that the allotment of a bonus is dependent upon the earning of profits by the company and bonuses may be increased

or reduced or may not be allotted at all. There is no evidance that the officer receives a smaller salary by reason of the fact that there is this payment coming to him on his retirement nor under the circumstance of the crediting each half year of the bonuses can a lump sum payment of the Fund be considered as a payment for past service. It is impossible to avoid the conclusion that the allotment is being made for present services and Mr. Patanjali Sastri contends that this sum is, as it is described in the rules, an accumulation of bonuses. It is conceded that in respect of cash bonuses paid to an officer in addition to salary they are assessable to income-tax under Section 7 as profits received by the officer in addition to his salary. Hence Mr. Patanjali Sastri argues that this is a receipt of accumulated bonuses by the assessee in addition to his salary. It seems to me that there is much force in this argument. It is difficult to see how this sum can be held to be a sum paid in commutation of a pension. You have first of all, got to have a scheme of pension in order that a pension can be commuted and it is only if this was a commuted pension that Section 4 (3) (v) can apply. The words of the section are not a sum received 'in lieu' of a pension but 'in commutation' of it and I cannot see that the sum can be described 'as equivalent of a pension as in the Patna Case. Nor can I agree with Mr. T. M. Krishnaswamy Ayyar's argument that it is akin to commutation of pension because he concedes that there must first of all here be something that is akin to a pension and then the payment must be akin to commutation of such a pension. It is true that the company pays its officers no pension on retirement and that this is a lump sum payment on retirement but I regret that I am unable to hold that that in itself is sufficient to exempt the money from assessability to income tax. In my opinion the contention put forward by Mr. Patanjali Sastri for the Income Tax Commissioner is correct and this amount must be regarded as sums set apart periodically, that is to say, half yearly, by the company in respect of present services rendered by the assessee as an addition to salary under Section 7 (1) of the Act. Instead of being actually paid then, they are allowed to accumulate and are paid to him in lump sum on his retirement and, being accumulations of sums credited to him for present services, I feel that the fact that they are paid to him at the end of his service in a lump sum does not make any difference; and I regret, therefore, that I am unable to agree with the answers of my learned brothers CORNISH and PANDRANG ROW, JJ. which are about to be given upon this point.

There remains the other question raised, namely question No. 2. I am clearly of the view that this question must be answered in the negative. The Assessee's contention is that he has received this amount by reason of the vocation carried on by him. The answer to this contention is that he has been assessed under the head of 'salary' under Section 7 (1) of the Act. Section 6 provides that 'the following heads of income, profits and gains, shall be chargeable to income tax in the manner hereinafter

appearing, namely:—(i) Salaries (ii) Interest on securities (iii) Property (iv) Business (v) Professional earnings (vi) Other sources'. Each of these is dealt with in separate sections of the Act. The assessee has always been assessed under Section 7 (1). This income clearly does not fall under any of the Clauses (ii), (iii), (iv), (v) and (vi). Section 25 (3) was intended to prevent a double assessment. It cannot be intended to apply to a case where income tax is assessed on salaries in the year in which they are earned. If the section were to apply, it would lead to this very strange and unreasonable result that an assessee who chooses to relinquish his appointment in the eleventh month of the year would escape payment of income tax on the salary earned by him in these eleven months whereas, if he continued for one month longer, admittedly he would be assessable on his salary in the whole of the twelve months. Mr. T. M. Krishnaswamy Ayyar was quite unable to give any reason why such should be the result. In my view, therefore, as this sum falls to be assessed under Section 7 (1) of the Act, Section 25 (3) cannot be applied to it. I would, therefore answer both questions accordingly. In view however of the answers of my learned brothers question No. 1, must be answered in favour of the assessee. Question No. 2 is answered in the negative. Cost Rs. 250 to the assessee.

CORNISH, J.—Upon the first question referred my opinion is that the sum of Rs. 36,794 received by Mr. Fletcher from the Company on his retirement was not income. Income, as their Lordships of the Judicial Committee have explained in *Commissioner of Income Tax, Bengal* v. *Shaw Wallace & Co.* (I.L.R. 59 Cal. 1351), connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity from definite sources. If the payment made to Mr. Fletcher can be regarded, as contended on behalf of the Commissioner, as a payment of deferred salary or of an accumulation of Salary, which had been credited to him, but not actually received by him while he was in the service of the company, it would, I think, be income when he did receive it. It would be salary or a gratuity or profit received by him in addition to his usual salary as much as the cash bonuses paid to him from time to time by the company were salary. But in my opinion the contributions made by the company to the credit of its officers in the Officers' Retiring Fund are not part of the Officers' salaries, nor are they a gratuity or profit received by the officers in lieu of or in addition to salary. This contribution is called a bonus in the rules of the Fund. But the name is not of much significance. It is in fact a voluntary contribution made by the Company to the Fund under the conditions framed by the Fund Rules, and the true character of the contribution must be gathered therefrom. An officer who has served the company for the requisite period becomes qualified to membership of this Fund. He will be credited with his appropriate share in the contributions made by the company to the Fund; and it appears that a pass book is issued to officers showing how their credit stands in the Fund. Rule 2

provides that every bonus shall in the first instance be apportioned as between the officers of the company in proportion to the salaries drawn by them respectively at the date of the allotment of such bonus by the company and shall be credited in such proportions to such officers in account with the Fund. But the rules do not require that the company shall make any contribution to the Fund at any particular period. It is a matter which is left entirely to the pleasure of the company, the directors of the company have sole control over the investment of the money in the Fund.

The rules provide that no Officer shall have any claim against the company in respect of any bonus or otherwise as regarding the Fund until he leaves the service of the company and shall have previously served the company continuously and satisfactorily for the period required of him by the rules. In the event of his death during his term of service it is provided that the amount then standing to his credit in the Fund shall be paid to his legal representatives but the rules give him no power of nomination over the amount to his credit in the Fund. Then Rule 6 says that in the event of an officer leaving the service of the company or being dismissed before having completed the term of service required of him, the amount standing to his credit shall be apportioned to the credit of the other officers then in the employ of the company. And Rule 7 provides that nothing contained in the rules shall in any way be taken to restrict the powers of the company from at any time dispensing with the service of, or dismissing any officer. This rule further provides that an officer whose service shall be dispensed with or who shall be dismissed before completing his full period of service shall have no claim whatever against the Fund.

These conditions imposed upon an officer's right to receive payment from the Fund entirely negative, in my judgment, the notion that the amount credited to him in the Fund is credited to him by way of salary or as a gratuity in lieu of or in addition to salary. If these credits were intended to be an additional remuneration I cannot imagine why, in the event of an officer's service being dispensed with, for no fault of his own, he should be disqualified by Rule 7 from at least receiving so much as he had earned to his credit up to that date. I think the only feasible explanation is that the bonuses credited to an officer in the Fund are not intended to be salary or gratuity. If the amount received from the fund by an Officer on his retirement is not given to him as salary it is not income liable to tax under Section 7 (1). It is not suggested on behalf of the Commissioner that the sum is taxable under any other head of income.

I am unable to perceive any essential difference between the payment of a lump sum from this Officers' Retiring Fund to an officer on his retirement and the payment of a lump sum from a Provident Fund to an employee on his retirement, or the payment of a sum with accrued bonuses, payable to the assured under a

policy of insurance. The two last mentioned sums are specifically exempted from taxation by Section 4, sub-Section 3, Clause 5 of the Act. But this exemption is not an arbitrary one. In I.L.R. 59 Cal. 1351 supra their Lordships have pointed out that none of the sums specified in Clause 5, apart from their exemption by the Act, could be regarded in any scheme of taxation as income. The reason is that payments such as those mentioned in Clause 5 do not come within the meaning of the word 'income' as defined by their Lordships. For these reasons my answer to the first of the questions referred is in favour of the assessee.

With regard to the second question I think that a comparison of Section 25 (3) with Section 11 of the Act makes it clear that the profits from a profession or vocation mentioned in the first named section mean the professional earnings which are taxable under Section 11 (v). An assessee can only have the benefit of Section 25 (3) if he has been assessed for tax on professional earnings. I would therefore answer the second question against the assessee.

PANDRANG ROW, J.—This is a reference made by the Commissioner of Income Tax, Madras, under Section 66 (2) of the Indian Income Tax Act (XI of 1922) at the instance of Mr. B. J. Fletcher, who was an employee in the service of the Buckingham and Carnatic Mills Co., Ltd. for about 24 years till 28th February, 1933 when he retired from service. During the period of his employment the company was paying him a monthly salary as well as a half yearly cash bonus out of its profits, and income tax was being collected on these amounts. The company had constituted an Officers' Retiring Fund and made rules for its management. The company allotted every half year out of its profits a certain sum to the credit of this Fund and invested the same; the amount together with the interest earned was apportioned between such of its officers as were admitted to the benefits of the Fund in proportion to their salaries and the amounts credited to each officer were shown in a separate pass book given to him. The company undertook to pay the amount lying to the credit of an officer to him on his leaving its service after having previously served continuously and satisfactorily for a certain period (six years in Mr. Fletcher's case) to the Officer, and in the event of his death, whether during or after the said period of service, to his legal representatives. In the event of an officer leaving the company's service or being dismissed before completing the said period of service he is to have no claim whatever to the amount lying to his credit in the Fund, and the same is to be apportioned to the credit of other officers then in the employ of the company. The last rule declares the right of the directors of the company to decide in their discretion which of the officers shall be eligible for the benefits of the Fund, and to make any alteration or addition to the rules, and that the Directors' decisions on these points and also as to the meaning of the rules and

on all other matters connected with the Fund or its administration shall be final and conclusive.

When Mr. Fletcher retired from the company's service on 28th February, 1933, the amount to his credit in the Retiring Fund was Rs. 36,794-3-2, and when paying this amount to him the Company deducted therefrom Rs. 6,496-7-0 as income tax and remitted the amount of tax to the Government of India. Mr. Fletcher objected to this deduction of income tax on two grounds, *viz.*, that the amount of Rs. 36,794-3-2 paid out of the Retiring Fund was not his income and that he was not liable to any assessment to income tax during the year 1933-34 under Section 25 (3) of the Act as he had ceased to be in the company's employ, and thereby discontinued his vocation during that year. These objections were overruled by the Income tax Officer, and also on his appeal by the Assistant Commissioner of Income Tax. The same objections are repeated in the questions raised in the present reference, namely ;

(1) Whether the sum of Rs. 36,794 paid to Mr. Fletcher in 1932-33 was income liable to tax, or was a capital sum exempted under Clause (v) of sub-Section 3 of Section 4 or otherwise.

(2) Whether Mr. Fletcher is entitled to relief under Section 25 (3) of the Act on the ground alleged by him *viz*, that he discontinued his profession in the year of account.

The second question does not involve any real difficulty. The words of the sub-section relied upon are themselves clear, and they show that it applies only where the business, profession, or vocation which is discontinued is one on which tax was at any time charged under the provisions of the Income Tax Act, 1918. Even on the assumption that Mr. Fletcher's employment as an officer of the company was a profession or vocation, it was never assessed to tax as such under the Act of 1918 ; the assessment of his income from such employment was under the head of 'salaries', and not under the head of profits from any profession or vocation followed by him. It is not contended that the employment was a business as defined in the Act. It is, moreover, clear that the provisions of this sub-section were meant to apply only to cases in which there had been a double assessment to tax in the year 1922-23 as a result of the change brought about by the Act of 1922—See *A. C. T. Nachiappa Chettiar* v. *The Commissioner of Income Tax, Madras* (6 I. T. C. 369 at p. 373). It is stated in the reference as a matter of fact, and this statement is not controverted before us, that so far as salaries were concerned there was no such double assessment in the year 1922-23, and that Mr. Fletcher in particular was not assessed to tax in the year 1922-23 in respect of his income in the previous year. Mr. Fletcher's claim to relief under Section 25 (3) of the Act cannot therefore be sustained either on the words of that sub-section or any other ground. The second question must therefore be answered in the negative.

The first question in the reference calls for fuller consideration. It is obvious that the Officers' Retiring Fund was constituted in order to make provision for the employees at the time of their retirement and for their legal representatives in case of their death while in service. The company allotted certain amounts from its profits to this Fund every half year and these amounts which were invested and the interest derived therefrom were apportioned among the employees and credited to their separate accounts. There is nothing in the Rules of the Fund which contemplates that the company might at any time take back for its own use or for any other purpose the monies so credited to its employees, even though the monies are actually retained in its own hands. The retention of the monies was only for the purpose of making payments out of the Fund to the employees under the rules, and the company never had any beneficial interest in the monies credited to the employees. The Company had no doubt full discretion in the matter of allotment, but once the allotment was made its rights were confined to mere administration of the Fund for the benefit of its employees. As monies were allotted every half year to the Fund from the company's profits they were not treated as the company's expenditure when assessing the company's profits to tax; in other words, they were included in the profits and taxed as such, and they were shown in the company's half yearly balance sheet under 'Capital.' Considering all the circumstances it would appear that after the monies were allotted by the company to the Retiring Fund, the company invested them and held the accumulations as trustee for its employees, and acted in the same capacity when making payments out of them under the rules. If this contention on behalf of Mr. Fletcher is correct it follows that the payment made by the company to Mr. Fletcher was not a payment made by the company as an employer but a payment made by it as trustee, and cannot therefore be assessed to tax under the head of salaries. See *Commissioner of Income Tax, Burma* v. *The Rangoon Electric Tramway and Supply Co., Ltd.* (I.L.R. 11 Ran. 70), and the 2nd sub-paragraph of paragraph 25, Income Tax Manual, p. 169 (5th Edition). In the Rangoon case there was no doubt an actual transfer of the shares which were purchased from the monies allotted as bonuses to the Managing Director of the company and the employee. But actual transfer of ownership to the trustee is not always necessary to create a trust in relation to moveable property; under Section 5 of the Indian Trusts Act (II of 1882), a declaration of trust is sufficient in such a case, and under Section 3 of that Act an obligation annexed to the ownership of property arising out of a confidence declared and accepted by the owner for the benefit of another is a trust. The Rules of the Fund framed by the company are a sufficiently clear declaration of a trust in favour of the employees admitted by the company to the benefit of the Fund.

On behalf of the assessee Mr. T. M. Krishnaswamy Ayyar

next contends that the payment in question is covered by either the 5th or the 7th clause of sub-Section 3 of Section 4 of the Income Tax Act. The 5th clause is relied upon in support of the contention that the payment of Rs. 36,794 to Mr. Fletcher is payment of a capital sum in commutation of pension. Mr. Patanjali Sastri argues *contra* that commutation of a pension ordinarily implies a pension there being no pension in the present case, and that while commutation of a pension, moreover, involves the consideration of factors such as the age and state or health of the pensioner, and the general rate of interest and the like no such consideration was required in the present case. There can be no doubt that a pension is a periodical allowance for past services, and that by commutation a lump sum is paid in lieu of the periodical payments; See *The Municipal Council, Salem* v. *Gururajah Row* (68 Mad. L. J. 118). Mr. T. M. Krishnaswamy Ayyar, however, relied strongly on *Rutherford* v. *The Commissioner of Income Tax, Bihar and Orissa* (I.L.R. 10 Patna 315), in which it was held that a lump sum paid not as pension but expressly as gratuity by the Court of Wards as employer to an employee after the latter's retirement was a capital sum paid in commutation of pension, although no single payment of an instalment of pension was ever made to the employee. The argument that there must first be pension and that the commutation must follow in point of time was characterised by Courtney-Terrell, C. J., as being not well founded. The same argument put in slightly different language, *viz.*, that no pension was admissible to the employee and that, therefore, there was nothing to commute was answered by DHAVLE, J., as follows: 'The answer to this contention is that the precise form used is of little moment in interpreting the Income Tax Act. What must be looked at is the real nature of the sum in question, and it is clear from the Official correspondence that what was given to the assessee on his retirement from service was but the equivalent of a commuted pension in essence, in spite of the technical reason for which it was recommended and sanctioned under the denomination of gratuity.' Both the learned Judges agreed that what must be considered is the real nature of the transaction. Counsel on both sides in the present case are also agreed that the real nature of the payment must be ascertained for the purpose of deciding the point.

There is no doubt in my mind that the payment of Rs. 36,794, to Mr. Fletcher on his retirement from the company's service was in substance and in truth the payment of a lump sum in lieu of pension, *i.e.*, in consideration of his past services. The amount depended in part at least on the length of his service and it was paid, out of what has always been designated, as the Officers' Retiring Fund, under the rules of that Fund. The existence of such a fund may reasonably be presumed to have been and to be one of the inducements offered by the company to those who sought and will seek to be employed in its service, especially in the absence of any other provision after retirement in the shape of pension. The

prospect of getting on retirement after long and approved service a pension or its equivalent, by whatever name it may be called, is one of the important factors which attracts candidates for employment, in short, there are three such important factors, *viz.*, pay, promotion and pension; whatever shape these may take, they do not change in essence; in *Rutherford* v. *The Commissioner of Income Tax, Bihar and Orissa*, (I.L.R. 10 Patna 315), the position was stated by Courtney-Terrell, C.J., as follows at p. 318: "The candidate therefore enters upon his office under the court of wards with a definite salary and the expectation that he will receive at the end of his service the equivalent of a pension—but he knows that he will not after his retirement be given a series of periodical payments but in lieu thereof will get a lump sum. In other words, he is to get a pension which will certainly be commuted." The position is more or less the same in the present case. The words 'in commutation of' found in Section 4 (3) (v) of the Act do not necessarily convey a meaning essentially different from that of the words 'in exchange of' or 'in lieu of', the essential idea is substitution or change. If instead of paying a pension, *i.e.*, a periodical payment for past services, an employer elects from the very outset to pay a lump sum, or, in other words, the pension scheme adopted by an employer contemplates the payment of a lump sum, instead of periodical payments, as pension, the real nature of the payment is not affected thereby, and which was all the time intended as pension or reward for past service does not lose its character. In short, when a lump sum is paid as pension its receipt by the employee comes within the 5th clause of Section 4 (3) of the Act.

In view of this conclusion it is unnecessary to consider the alternative claim to exemption under the 7th clause of Section 4 (3) of the Act. That clause can apply only when the receipt is not by way of addition to the remuneration of an employee. Mr. T. M. Krishnaswamy Ayyar relies in this connection on the decision of the House of Lords in *Seymour* v. *Reed* (1927 A.C 554) to the effect that the payment of the proceeds of a benefit match to a professional cricketeer by the club which employed him is a personal gift and not a profit or perquisite arising from his employment, and therefore not assessable to tax. The facts of the present case are however different; it is not a solitary gift with which the present case is concerned, but a series of gifts made every half year out of the employer's profits to the employees' Retiring Fund and as part of the conditions of employment. The words used in the Indian Income Tax Act are moreover different from those found in the English Income Tax Act, and this difference recalls to one's mind the following observations of their Lordships of the Judicial Committee in *Commissioner of Income Tax, Bengal* v. *Shaw Wallace & Co.*, I.L.R. 59 Cal. 1343. "Their Lordships would discard altogether the case law which has been so painfully evolved in the construction of the English Income Tax Statutes—both the cases upon which the High Court relied and the flood of other decisions

which has been let loose in this Board. The Indian Act is not in *pari materia*......Under such conditions their Lordships think that little can be gained by attempting to reason from one to the other, at all events in the present case in which they think the problem lies very near the surface of the Act and depends mainly on general considerations".

The observations which follow the above deal with the general question of what 'income' is, and they are of considerable importance in the present case which raises the general question whether the payment of Rs. 36,794, to Mr. Fletcher is income liable to tax. Their Lordships had also to consider the argument based on Section 4 (3) (v) of the Act, the words of which appear to suggest that the word 'income' may have a wider significance than would ordinarily be attributable to it, and they were of opinion that the clause cannot be construed 'as enlarging the word' income so as to include receipts of any kind which are specially exempted. The character of income is described by their Lordships as follows:—" Income, their Lordships think, in this Act connotes a periodical monetary return 'coming in' with some sort of regularity or expected regularity from definite source." The sum of Rs. 36,794 received by Mr. Fletcher on his retirement was not of the nature of a periodical return; it was a unique receipt, not to be repeated. It is, to my mind, difficult to regard it as 'income' in view of what their Lordships of the Judicial Committee have said in the case referred to above. The source from which Mr. Fletcher received the money was the Officers' Retiring Fund, and under the Rules of that Fund only one receipt and no more could be expected by him or by any other employee. It was not a source from which periodical monetary returns could come in so far as the employee was concerned. The only return he could expect was a single payment on retirement. I am therefore of opinion that the receipt of the lump sum in question is not income.

It follows from the above that the first part of the first question must be answered in the negative and the second part in the affirmative.

[IN THE PRIVY COUNCIL.]

MAHARAJKUMAR GOPAL SARAN NARAIN SINGH

v.

COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA.

Lord Blanesburgh, Lord Russell of Killowen, and Sir Lancelot Sanderson.

May 28, 1935.

ANNUITIES—SALE OF PROPERTY—STIPULATION FOR PAYMENT OF ANNUITY TO VENDOR—ANNUITY, WHETHER INCOME OR CAPITAL RECEIPT—' INCOME ', MEANING OF—DOES NOT NECESSARILY CONNOTE PROFIT OR GAIN—AGRICULTURAL INCOME, INCIDENTS OF—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 2 (1), 4 AND 12 (1).

The assessee who owned a nine annas share in an estate, with the object of discharging his debts and of obtaining for himself an adequate income for his life, conveyed the greater portion of his estate to his son, in-law's mother who owned the remaining seven annas in the estate. The consideration for the transfer was (i) the payment of the assessee's debts amounting to Rs. 10,26,937 ; (ii) a cash payment of Rs. 4,73,063 ; and (iii) an annual payment of Rs. 2,40,000 to the assessee for his life. On a reference by the Commissioner, the Patna High Court held (MOHAMMAD NOOR, J. *dissenting) that the amount of Rs. 2,40,000 thus received by the assessee annually was income and not a receipt of a capital sum in instalments and was therefore assessable to income tax and supertax. It was further held that the said income was not agricultural income and was not exempt from tax as such. The assessee appealed to the Privy Council :*

Held, (*i*) *that the annual payment was not agricultural income as it was not rent or revenue derived from land but money payable under a contract imposing a personal liability on the covenantor the discharge of which was secured by a charge on land ;* (*ii*) *that this was clearly a case where the owner of an estate* (*the assessee*) *had exchanged a capital asset for* (inter alia) *a life annuity which was income in his hands and not a case in which he had exchanged his estate for a capital sum payable in instalments ; and* (*iii*) *that this income was taxable under the Income Tax Act even though the annuity did not constitute or provide a profit or gain to the assessee.*

The word ' income ' is not limited by the words ' profits and gains ' and anything which can properly be described as income is taxable under the Act unless expressly exempted.

Dictum : *Little can be gained by trying to construe an Income Tax Act of one country in the light of a decision upon the meaning of the income tax legislation of another.*

The fact that certain annual payments are stated to be part of 'the price' of a property sold does not make them necessarily capital payments. It only means that they are part of the consideration for the transfer and that consideration may well take the form of annual sums which will be income in the hands of the payee.

Case referred to:—

COMMISSIONER OF INCOME TAX, BENGAL *v.* SHAW WALLACE & Co. [1932] (59 I.A. 206; 136 I.C. 742; 1932 Comp. Cas. 276; 5 I.T.C. 211) referred to.

Appeal from a Judgment of the Patna High Court dated April 17, 1934.

The Judgment of the Patna High Court is reported at p. 264 *et seq* of Vol. II of the *Income Tax Reports*.

A. M. Latter, K. C., Sultan Ahmed and *Heyworth Talbot*, for the appellant.

A. M. Dunne, K. C., and *Thomas Strangman*, for the respondent.

LORD RUSSELL OF KILLOWEN.—The appellant appeals from a judgment of the High Court of Judicature at Patna on a reference under Section 66 (2) of the Indian Income Tax Act, 1922 (hereinafter referred to as the Act). The question for decision may be stated to be whether the appellant is assessable to income tax and supertax in respect of an annual sum of Rs. 2,40,000 payable to him during his life pursuant to a covenant contained in the indenture hereinafter mentioned.

The appellant was the owner of an estate in British India known as the Nine Annas Tikari Raj. He had a daughter who had married a son of Rani Bhubaneshwari Kuar (hereinafter referred to as the Rani).

By an indenture, dated March 29, 1930, and made between the appellant of the one part and the Rani of the other part, the appellant conveyed the greater portion of his said estate to the Rani for the valuable consideration therein appearing. The indenture recites amongother facts that the appellant was absolute owner of the estate and that for the purpose of discharging certain of his debts and of obtaining for himself an adequate income he had agreed with the Rani for the absolute sale and transfer to her of that portion of his said estate described in the first schedule in consideration of the Rani covenanting to pay the said debts (which amounted in fact to a sum of over Rs. 10,00,000) and to pay to him a sum of Rs. 4,73,063, in cash to meet the expenses of his daughter's marriage and other urgent necessities and further covenanting to pay him annual sums during his lifetime of Rs. 2,40,000 in manner thereinafter appearing, such payment being secured by a charge upon the property thereby transferred. By the operative

part of the indenture it was witnessed that in pursuance of the said agreement and in consideration of the sum of Rs. 4,73,063 paid to the appellant and in further consideration of the covenant by the Rani for payment to the appellant during his lifetime of the annual sum of Rs. 2,40,000 by six instalments, and also in consideration of the covenant to pay and indemnify the appellant in respect of the said debts the appellant assigned the hereditaments therein described unto the Rani absolutely. The indenture contained a covenant by the Rani with the appellant for payment to him during his lifetime, of the yearly sum of Rs. 2,40,000 by six equal instalments, with interest at 12 per cent. per annum on any over-due instalment, and to pay the said debts and to keep the appellant indemnified against all suits, actions and proceedings whatsoever in respect of the said debts or any of them.

This indenture does not itself contain any charge on the estate of the annual sums covenanted to be paid ; but their Lordships were informed and the case proceeded upon the footing that the stipulated security had been given by a separate document.

The taxing authorities in assessing the appellant in respect of the year 1931-1932 included in his assessable income the following item :—" Other sources : annuity, Rs. 2,40,000," being the sum received by him in pursuance of the Rani's covenant. The appellant contends that no part of this receipt should be included (1) because being merely an instalment of the purchase price payable on the sale of his estate it is not an annuity but a capital sum ; alternatively, (2) because even if it be an annuity it is not taxable, because it does not fall within the description of what is taxable under the Act ; and in the further alternative, (3) because even if it would otherwise fall within such description it is " agricultural income " and as such specifically excepted from the operation of the Act.

The relevant provisions of the Act are the following :—

" 2. In this Act unless there is anything repugnant in the subject or context,—

(1) ' agricultural income ' means—

(*a*) any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land-revenue in British India or subject to a local rate assessed and collected by officers of Government as such.

3. Where any Act of the Indian legislature, enacts that income tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals,

4. (1) Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in Section 6, from whatever source derived, accruing or arising, or received in British India or deemed under the provisions of this Act to accrue, or arise, or to be received in British India.

(2) . . . .

(3) This Act shall not apply to the following classes of income:

(*viii*) Agricultural income.

. . . .

6. Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income tax in the manner hereinafter appearing, namely :—

(*i*) Salaries.

(*ii*) Interest on Securities.

(*iii*) Property.

(*iv*) Business.

(*v*) Professional Earnings.

(*vi*) Other Sources.

7. (1) The tax shall be payable by an assessee under the head 'Salaries' in respect of any salary or wages, any annuity, pension, or gratuity, and any fees, commissions, perquisites, or profits received by him in lieu of, or in addition to any salary or wages, which are paid by or on behalf of Government, a local authority, a company, or any other public body or association, or by or on behalf of any private employer :

12. (1) The tax shall be payable by an assessee under the head 'Other Sources' in respect of income, profits and gains of every kind and from every source, to which this Act applies (if not included under any of the preceeding heads).

(2) Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee."

In their Lordships' opinion it is impossible to hold that this annual payment is "agricultural income" within the meaning of

the Act. It is not rent or revenue derived from land; it is money payable under a contract imposing a personal liability on the covenantor the discharge of which is secured by a charge on land. The covenantor is at liberty to make the payments out of any of her moneys, and is bound to make them whether the land is sufficiently productive or not. Their Lordships are in agreement with the opinion of the Judges in India which upon this point was unanimous.

Upon the remaining questions there has been a division of opinion among those Judges. The Chief Justice and VARMA, J., were of opinion that the sum in question was not a capital sum, but was "income" within the meaning of that word as used in Section 12 (1) of the Act, and therefore taxable. On the other hand, KHAJA MOHAMMAD NOOR, J., took the view that the transaction was a sale of the estate for a capital sum or price of an amount dependent on the duration of the appellant's life, and that each annual payment was an instalment of that capital sum and therefore not taxable as income.

Their Lordships find themselves in agreement with the Chief Justice and VARMA, J. Indeed but for the elaborate argument addressed to the Board they might well have contented themselves with adopting the careful judgment of the Chief Justice which covers the whole ground. It is impossible, without ignoring the plain language of the indenture of 29th March, 1930, to treat the annual payments as instalments of a capital sum. To say that they are part of "the price" of the sale does not make them necessarily capital payments. It is only to say that they are part of the consideration for the transfer of the property, and that consideration may well take the form of annual sums which will be income in the hands of the payee. In this indenture the intention of the appellant is made clear. He was absolute owner of the estate; he could have given it away. What he does, and what he states in the document he wishes to do, is to part with the estate in order to get rid of his debts, and to obtain for himself an adequate income. He accordingly transfers the estate to the Rani and obtains from her in exchange (1) a covenant to pay the debts in the second schedule, (2) a sum of cash to meet the expenses of his daughter's marriage, and (3) a covenant to pay him a life annuity. This is clearly no ordinary bargain and sale by a vendor and purchaser at arm's length, for the money consideration bears no relation to the actual value of the property. The amount ultimately payable by the purchaser depends upon the life of the vendor. It is, their Lordships think, clearly a case where the owner of the estate has exchanged a capital asset for (*inter alia*) a life annuity which is income in his hands. It is not a case in which he has exchanged his estate for a capital sum payable in instalments.

But it was argued that even though the life annuity be income, as distinct from capital, it still is not income taxable under the Act,

because the words "income, profits and gains" in Section 12 (1) of the Act must be construed as including only such income as constitutes or provides a profit or gain to the recipient, *i.e.*, that the word "income" is in some way limited by its association with the words "profits and gains." This being so, it is said that in view of (*a*) the true value of the estate (alleged to be about 2 crores of rupees) and (*b*) the age of the appellant (alleged to be about 47 at the date of the transaction), the annuity could never constitute or provide a "profit" or "gains" to him, and therefore cannot be "income" which is taxable under the Act.

Their Lordships agree with the opinion expressed by the Chief Justice upon this point. The word "income" is not limited by the words "profits" and "gains." Anything which can properly be described as income, is taxable under the Act unless expressly exempted. In their Lordships' view the life annuity in the present case is "income" within the words used in the judgment of this Board which was delivered in the case of *Commissioner of Income Tax, Bengal* v. *Shaw Wallace & Co., viz.*,:—

"Income, their Lordships think, in this Act connotes a periodical monetary return 'coming in' with some sort of regularity or expected regularity from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. This income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something, which is often loosely spoken of as 'capital.' But capital, though possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production."

Here the source of the life annuity is the covenant. The life annuity is the produce of one of the items (*viz.*, the covenant) which the appellant has taken in exchange for the estate.

Reference was made before their Lordships to various decisions upon the taxing Acts of other countries, Acts which are couched in different terms and framed upon different lines. So far as these decisions had any relevance to the points under consideration, they appear to have been suitably considered and dealt with in the judgments of the Chief Justice and VARMA, J. Their Lordships think it unnecessary to discuss them further. They content themselves with repeating the view expressed in the judgment of the Board above referred to, that little can be gained by trying to construe an Income Tax Act of one country in the light of a decision upon the meaning of the income tax legislation of another.

For the reasons above appearing their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors :—*Messrs. Douglas, Grant and Dold*, for the appellant; *Solicitor, India Office*, for the respondent.

[IN THE LAHORE HIGH COURT.]

BELI RAM BROTHERS

v.

COMMISSIONER OF INCOME-TAX, PUNJAB [No. 2].

June 13, 1935.

Addison and Din Mohammad, JJ.

HINDU UNDIVIDED FAMILY—SEPARATION OF MEMBERS AND CONSTITUTION OF NEW FIRM—PROPER MODE OF ASSESSMENT—ASSESSMENT AS FIRM—REFERENCE—NEW QUESTIONS—COMMISSIONER'S POWER TO REFER ADDITIONAL QUESTIONS—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 25-A, 26 AND 66 (1) & (3).

Where the members of a Hindu undivided family separate, there is nothing to prevent the separated members from immediately forming themselves into a firm and if they do so, they should be assessed under Section 26 of the Income Tax Act and not under Section 25-A.

Where it is claimed that a Hindu undivided family has separated and that the members have constituted themselves into a firm, the Assistant Commissioner would not be justified in refusing to decide whether Section 25-A or Section 26 applied to the case, merely because such an inquiry would involve an interference with an order of the income-tax officer refusing to register the firm.

Where on the application of an assessee under Section 66 (3) of the Income Tax Act the High Court has directed the Commissioner to refer certain questions of law, the Commissioner may, if he is of opinion that any additional question arises, refer that question also under Section 66 (1).

Case stated by the Commissioner of Income Tax, Punjab, N.W.F.P. and Delhi, under Section 66 of the Indian Income Tax Act, XI of 1922. [Misc. No. 608 of 1934].

For the prior proceedings in the case see *Beli Ram Brothers* v. *Commissioner of Income Tax* [(1935) 3 I.T.R 103].

Kirpa Ram Bajaj and *N. M. Aslam Khan*, for the assessees.

J. N. Aggarwal and *S. M. Sikri*, for the Commissioner.

JUDGMENT.—In the matter of the assessment of the business of Beli Ram Brothers for 1932-33, this Court required the Commissioner of Income Tax* to state the case and refer it for decision under the provisions of Section 66 (2) of the Income Tax Act, the question formulated being whether the Assistant Commissioner's refusal to determine which of the two Sections 25-A or 26 applied to the facts of the case was justified. The Commissioner of Income Tax has stated the case and has referred in addition the following question under the provisions of Section 66 (1) of the Act:—

"What is the proper taxation basis in the circumstances stated?"

Prior to the year under assessment the business was owned by a Hindu undivided family, consisting of the father and three sons. When the present return was put in, it was asserted that partition had taken place, that the father had left the business completely receiving the whole immovable property owned by the family as his share, while the three sons after separation constituted themselves into a firm, and that the assessment of the business should, therefore, be made on the new firm. Reliance was placed on an award dated the 31st March, 1932, and the deed of partnership, dated the 14th July, 1932, and the Income Tax Officer was also asked to register the firm under Section 26-A. The Income Tax Officer came to the conclusion that the members of the family separated on the 31st March, 1932, but that the case fell within Section 25-A of the Act and at the same time he refused to register the firm. The Assistant Commissioner on appeal confirmed the finding that there was separation on the 31st March, 1932, but he declined to decide whether Section 25-A or Section 26 applied, on the ground that the decision depended on the determination of the question whether a firm had been constituted or not and this involved an interference with the finding of the Income Tax Officer under Section 26-A refusing to register the firm, a matter which at that time was not subject to appeal. The Commissioner refused to interfere or to state a case to this Court with the result already stated.

The opinion of the Commissioner is that Section 25-A is applicable as that is a special provision and, therefore, stands above the general provisions of Section 26. It is true that Section 25-A was added later but it was inserted before Section 26 for the reason that it must have been thought that that was its proper place. According to Section 25-A, where it is claimed that a partition has taken place, the Income Tax Officer shall make such enquiries thereinto as he shall think fit, and, if he is satisfied that a proper separation has in fact been effected he shall record an order to that effect. When such an order has been passed, it is then his duty to make an assessment of the total income received as if no separation or partition had taken place, and each member or group of members shall in addition to any income-tax for which he or it may be separately liable be held

* The order of the High Court is reported at p. 103 *supra*.

liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it, provided that all the separated members or groups of members shall be liable jointly and severally for the tax assessed on the total income received by the joint family as such. Under Section 26 where it is found that a firm has been newly constituted the assessment on the firm and on the members thereof shall be made as if the firm had been constituted throughout the previous year as it is constituted at the time of making the assessment and as if each member had received a share of the profits of that year proportionate to his interest in the firm at the time of making the assessment. The contention of the Income Tax Commissioner is that when a joint family breaks up there must be an assessment on the individuals or groups under the provisions of Section 25-A. That however, does not seem to us to be correct, for if the separated members immediately form themselves into a firm, Section 26 will come into operation, and the assessment on the firm should be made under the latter section. There is no prohibition against the separated members immediately forming themselves into a firm and, if they do so, we are of opinion that they should be assessed under the provisions of Section 26. Our reply, therefore, to both questions is:—

(1) That the Assistant Commissioner was not justified in refusing to determine which of the two Sections applied; and

(2) that the proper taxation basis was under Section 26 of the Act.

On behalf of the assessee it was contended that we should not decide the second question, the ground taken being that the Commissioner had no authority to refer any matter other than the matter formulated in the question sent down to him. We disagree. Section 66 (1) is very general, being to the effect that, if in the course of any assessment under the Act or any proceeding in connection therewith other than a proceeding under Chapter VIII, a question of law arises, the Commissioner may draw up a statement of the case and refer it with his own opinion thereon to the High Court. There is no doubt that there was a proceeding going on in connection with an assessment under the Act and the Commissioner had, therefore, power to refer the additional question.

On behalf of the Commissioner it was contended that we should not interfere as, if the assessment is made as on a firm, no relief would result. This is denied on behalf of the assessee, counsel pointing out that in any case there would be relief with respect to the income of immovable property which each brother has inherited on the death of his father. It, therefore, seems to us to be necessary that this Court should decide what was the legal method of assessment, and we are of opinion that the assessment should have been under Section 26 of the Act on the firm.

Our replies to the two questions formulated are as stated above. It will now be for the Commissioner of Income Tax to decide whether he should not register the firm. This is not a matter for us but we have no doubt that had the Income Tax Officer come to the proper finding that Section 26 applied, he would have registered it.

Let the case go back to the Commissioner of Income Tax. The assessee will get his costs of this order from the Commissioner.

Reference answered.

[IN THE LAHORE HIGH COURT.]

In re THE TRUSTEES OF THE 'TRIBUNE'.

June 4, 1935.

Young, C. J., Addison, J. and Tek Chand, J.

On difference of opinion between Jailal, J., and Skemp, J.

INCOME TAX—TRUST PROPERTY—'PROPERTY HELD IN TRUST FOR CHARITABLE PURPOSE', MEANING OF—TRUST FOR CONDUCTING NEWSPAPER, WHETHER CHARITABLE—ENGLISH AND INDIAN LAW—LIABILITY OF TRUSTEES—MEANING OF 'PROPERTY', 'OBJECT OF GENERAL PUBLIC UTILITY'—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 4 (3) (*i*) and 9.

A person who owned a press and a newspaper created a trust by his will by which his property in the stock and goodwill of the press and newspaper was made to vest permanently in a committee of certain members. It was the duty of the said committee of trustees under the will 'to maintain the said press and newspaper in an efficient condition, to keep up the liberal policy of the said newspaper, devoting the surplus income of the said press and newspaper after defraying all current expenses in improving the said newspaper and placing it on a footing of permanency'. It was also provided by an arrangement made subsequently that in case the paper ceased to function or for any other reason the surplus of the income could not be applied to the object mentioned above, the same should be applied for the maintenance of a college which had been established out of the funds of another trust created by the same testator. There was a surplus income in the hands of the trustees after defraying the expenses of the press and the newspaper and on a reference by the Commissioner of Income Tax as to whether this income was liable to be assessed in the hands of the trustees, JAI LAL, J., *held that the income was exempt from assessment as income from property held under trust for charitable purposes within the meaning of Section 4 (3) (i) of the Income Tax Act.* SKEMP, J., *held that the income was taxable and the question was referred to a Full Bench :*

Held, YOUNG, C.J., *and* ADDISON, J., (TEK CHAND, J., *dissenting)—that the income in question was not income derived from*

property held under trust for charitable purposes as that expression is defined in Section 4 (3) of the Indian Income Tax Act and was assessable to income tax.

Per TEK CHAND, J.—*A trust of a public character like the one in question in which no immediate or ultimate personal benefit of any kind is reserved to any individual, created with the object of founding and maintaining a paper which conveys news and opinions on matters of general interest to the public, discusses matters of public interest and educates the minds of its readers on lines which the founder considered to be beneficial to the public at large is a trust for 'the advancement of an object of general public utility' as that expression is understood in law, and the income in question was exempt from assessment under Section 4 (3) (i) of the Indian Income Tax Act.*

Held also per JAI LAL *and* SKEMP, JJ.—(*i*) *that Sections 40 and 41 of the Indian Income Tax Act do not exhaust the categories of trustees who could be assessed;* (*ii*) *the expression 'association of persons' in Section 3 of the Act includes trustees of all descriptions and does not exclude them when the beneficiary is not a living person;* (*iii*) *the word 'property' in Section 4 (3) of the Income Tax Act does not bear the restricted meaning that it bears in Section 9 of the Act but includes also securities, business or a share in a business.*

Case stated by the Commissioner of Income Tax, Punjab, N. W. F. P. and Delhi under Section 6 (2) of the Indian Income Tax Act, XI of 1922 (Ref. No. 1 of 1934).

The case was heard by JAI LAL, J., and SKEMP, J., and as their Lordships disagreed on the main question, the case was referred to a Full Bench.

JAI LAL, J.—The Tribune is an extensively circulated newspaper printed in the Tribune Press at Lahore. Both the paper and the press were owned by *Sardar* Dayal Singh, a well known philanthropist of this province. By his will made many years ago he created a trust in respect of his estate and provided, *inter alia*, (*a*) "that my property in the stock and goodwill of the Tribune Press and newspaper in Anarkali, Lahore, shall vest permanently in a committee of the following members..." and (*b*) "it will be the duty of the said committee of trustees to maintain the said press and newspaper in an efficient condition, keep up the liberal policy of the said newspaper, devoting the surplus income of the said press and newspaper after defraying all current expenses in improving the said newspaper and placing it on a footing of permanency." By a subsequent arrangement, which is not mentioned by the Commissioner in his referring order, but is admitted by the counsel on both sides, it has been provided that in case the paper ceases to function or for any other reason the surplus of the income cannot be applied to the object mentioned above, the same shall be applied for the maintenance of the Dayal Singh College, Lahore, which is another institution established out of the funds of the trust created by *Sardar* Dayal Singh.

It appears that after the death of *Sardar* Dayal Singh the trustees have conducted the newspaper and maintained the press professing to act under the directions of the will and that there is some surplus income of the press and the newspaper after defraying all current expenses. This surplus income has been assessed by the Income Tax Officer to income tax and an objection has been raised by the trustees that such income is not liable to income tax on two grounds:

(1) That income in the hands of the trustees, except those mentioned in Sections 40 and 41 of Indian Income Tax Act, is not assessable to income tax; and (2) that the income in the present case is devoted to charitable purposes and is therefore exempt from assessment under Section 4 (3) (*i*) of the Indian Income Tax Act.

Both these contentions of the parties having been repelled by the Income Tax authorities, the Commissioner of Income Tax has referred the following two questions for decision by this Court on an application by the trustees :—

(1) Is the income of the Tribune trust liable to be assessed in the hands of the trustees under the provisions of the Income Tax Act; and (2) If so, is it not exempt under Section 4 (3) (*i*) of the Act.

It may incidentally be remarked that the form of the question would show that the burden of establishing the liability to assessment is on the income tax authorities; the question, however, being purely of law, the matter is immaterial.

We have heard counsel for the trustees and for the Commissioner at length. Mr. Mehr Chand Mahajan for the trustees conceded with reference to the first question that the persons mentioned in Section 3 of the Indian Income Tax Act are liable to be assessed to income tax. That section makes all income, profits and gains of "every individual, Hindu undivided family, company, firm and other association of individuals,' assessable to income tax subject to the other provisions of the Act. It is however urged by the learned counsel that the assessees in the present case, that is say, the trustees of the Tribune newspaper and the Tribune Press, do not fall within the category of those whose income, profits and gains are made liable to income tax by this section. But in my opinion, the expression "association of individuals" clearly covers the case of trustees such as present assessees are.

The further contention of the learned counsel, however, is that only those trustees are liable to pay income tax who are expressly mentioned in Sections 40 and 41 of the Indian Income Tax Act. Section 40 provides that in case of any guardian, trustee or agent of any person being a minor, lunatic or idiot or residing

out of British India being in receipt on behalf of any such person of any income, profits or gains chargeable under the Act, the tax shall be levied upon and recoverable from such guardian, trustee or agent in like manner and to the same amount as it would be leviable upon and recoverable from any such person. Section 41 deals with the cases of Courts of Wards, Administrators-General, official trustees, receivers and managers on behalf of other persons and the tax is made leviable from them in the like manner and to the same amount as it would be leviable and recoverable from the person on whose behalf they are acting. These sections do not seem to me to exhaust the category or description of trustees or other persons respectively who may be in receipt of income as such or on behalf of others, and do not therefore afford any support to the contention made on behalf of the assessees. Moreover, the primary section whch describes the persons whose income is liable to assessment is Section 3 of the Act and the two sections mentioned above which merely describe the manner in which those mentioned therein are to be assessed, cannot be held to limit the operation of Section 3 with regard to others.

A somewhat similar objection appears to have been taken before, and repelled by their Lordships of the Privy Council in *Trustees of the Sir Currimbhoy Ibrahim Baronetcy Trust* v. *Commissioner of Income Tax, Bombay* (1934 I.T.R. 151 ; 58 Bom. 317) as the following observation at page 324 (of 58 Bom.) shows: "an argument was also founded by counsel for the appellants upon Section 38 (2) of the Indian Income Tax Act (which requires trustees, guardians and agents to furnish the Revenue Officials upon request with a return of the names and addresses of their beneficiaries or principals) and upon Section 40 (which provides for the assessment of guardians, trustees and agents of incapacitated or non-resident persons). It was said that the existence of these provisions supported a construction of the Act which would exclude trustees in other cases. It is to be observed, however, that similar provisions in the United Kingdom Income Tax Acts were before the House of Lords in *Williams* v. *Singer* [(1921) 1 A. C. 65] and Lord Cave expressly says that the cases in which he considered that trustees might be assessed were additional to the cases so expressly provided for."

Another argument of the learned counsel is that the Act contemplates the assessability of trustees in those cases only where the beneficiary is a living person, and that in other cases the trustees are not liable to be assessed to income tax at all. No direct authority was cited in support of this proposition, but reference was made to a number of cases in which trustees have been made liable to pay income tax in respect of income of the trust property in their hands and in which the beneficiaries were living persons. These cases, however, do not lend any countenance to the suggestion of the counsel because they are no authority for the proposition that only the kind of trustees dealt with in them are liable to be assessed to income tax.

My conclusion therefore is that the expression "association of individuals" includes trustees of all descriptions and does not exclude them where the beneficiary is not a living person.

The second question referred to us, however, is a difficult one. Section 4 (3) of the Indian Income Tax Act provides that the Act shall not apply to the following classes of income :—

(1) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes the income, applied, or finally set apart for the application, thereto.

The question is whether the property in the present case is held under trust or other legal obligation wholly for charitable purposes. Now, "charitable purposes" is defined in Section 4 (3) as follows :—

'Charitable purpose' includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility.'

Several cases were cited at the Bar, most of them being cases decided by the English Courts. These cases may be divided into three categories :—

(1) Cases which indicate the meaning of the expression "charitable object" as it is interpreted by the Courts in England.

(2) Cases where objects of "public or general utility" are defined.

(3) Cases decided under the English Income Tax Statutes in which the question of exemption of particular descriptions of income from payment of income tax has been dealt with on an interpretation of the statutory provisions relating to such exemptions.

Now, it has been held by their Lordships of the Privy Council in *Commissioner of Income Tax, Bengal* v. *Shaw Wallace & Co.* (I. L. R. 59 Cal. 1343), that in interpreting the Indian Acts relating to income tax it is not always proper to rely upon English Cases on the same subject, because of the difference in the language used in the English Statutes and Indian Acts, respectively. The same view was taken in *Bejoy Singh Dudhuria* v. *Commissioner of Income Tax, Calcutta* (I. L. R. 60 Cal. 1029). I do not however understand that it has anywhere been definitely laid down that the Courts in India are in no case to take guidance from the English cases in which certain expressions have been interpreted when the question is as to the meaning of the same expressions as used in the Indian Acts. The case would of course be different when it appears from the Statute or the Act or the context of either that the expression is used in a different sense. I consider that it is open to us to refer to the English cases when dealing with the question of interpretation of the expressions "charitable" or "public or general utility," but the cases in which the question of exemption of particular descriptions of income is

dealt with are of no direct help, as the statutory law relating to exemption in England is different to the law in India.

An examination of the cases cited at the Bar shows that in England the expression "charitable" sometimes has been used in a more restricted sense than that in which it is used in the Indian Income Tax Act, as in some English cases even objects of general public utility have been held not to fall within the category of "charitable objects," while according to the definition of "charitable purposes" in the Indian Income Tax Act, on the other hand, objects of general public utility fall within the expression. An instance of such cases is to be found in *Kendall* v. *Granger* (59 Revised Reports 509) where in view of previous authority it was held that every object of general public utility is not necessarily a charitable object.

It, therefore, seems to me that if the object of the trust with which we are now concerned would fall within the definition of "charitable objects" as that expression is interpreted by the English Courts or within the definition of "general public utility" as that expression is understood there, then there would be greater reason why it should be held to be included within the meaning of charitable purpose as defined in the Indian Income Tax Act. To this extent, therefore, the English cases are useful for the purpose of deciding the second question referred to us.

In *In re Foveaux Cross* v. *London Anti-Vivisection Society* [1895, 2 Ch. 501], a question arose whether societies for the suppression and abolition of vivisection are charities within the legal definition of the term "charity." The Court answered this question in the affirmative after reviewing the previous case law on the subject. The following extracts from the judgment may be quoted with advantage:—

"To be a charity there must be some public purpose, something tending to the benefit of the community. The benefit in point of local area need not extend to the public at large; a trust for the benefit of the inhabitants of a particular district will suffice. In *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891 A. C. 531, 583], Lord Macnaghten said that charity, in its legal sense, comprises four principal divisions: trust for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. In examining the purposes of any particular trust the Court has taken a liberal rather than a narrow view of the subject. Under the head of the advancement of religion the Court has not confined itself to the advancement of the tenets of the Church as established by law; it has held trusts for the promotion of many diverse forms of the Christian religion to be valid charities. A strong illustration of this is to be found in *Thornton* v. *Howe*

[31 Beav. 14]. Sir John Romilly held there that a trust for the publication of the works of Joanna Southcott was a valid charity. He found that her works were not immoral or subversive of religion, although he found in them much that was very foolish, and, although he said that they were in a great measure incoherent and confused, he considered that they were written with a view to extend the influence of Christianity, *i.e.*, the advancement of religion. This was the ground on which he based his decision. He did not think that it was incumbent on him to say that religion would in fact, or according to his own judgment, be advanced. He looked to the view or purpose of the writer. Again, take the head of relief of poverty. Dole charities were greatly in favour with our ancestors. Modern experience, regard being had to the increase of population, change of residence, and other altered circumstances, has shown that such charities tend to pauperize a district, and are not beneficial; and in framing schemes the Court, having within the limits of judicial discretion to express its own views on the question, sets itself against this form of charity. Yet undeniably a dole charity if created at the present day is a valid charity. . . . . The question of what is and what is not justifiable is a question of morals, on which men's minds may reasonably differ and do in fact differ. Cruelty is degrading to man; and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men. The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community; whether, if they achieved their object, the community would, in fact, be benefited is a question on which I think the Court is not required to express an opinion."

In *In Re Macduff*; *Macduff* v. *Macduff* [(1896) 2 Ch. 451] a philanthropic purpose, *i.e.*, a purpose indicating goodwill to mankind in general was held to be included in the definition of "charitable purpose".

In *Whicker* v. *Hume* [115 Revised Reports, page 70] the House of Lords held that a bequest for propagation of education and learning was for a charitable purpose.

In *In re Scowcroft, Ormrod* v. *Wilkinson* [(1898) 2 Ch. 638] a reading room established for the propagation of conservative principles and religious and mental improvement was held to be a charitable gift on the ground that the furtherance of religious and mental improvement was its essential portion though it was combined with the advancement of conservative principles. Such a limitation was held not to be sufficient to prevent the gift from being a perfectly good charitable gift as undoubtedly it would be if it were a gift for the furtherance of religious and mental improvement alone.

In *Marsh* v. *Means* [108 Revised Reports, page 939] an opinion was expressed that a gift for the continuation of a periodical for supporting the objects and principles of prevention of cruelty practised on animal creation would be a charitable gift being consistent with the general design for the instruction of mankind.

In *In re Stephens, Giles* v. *Stephens* [8 Times Law Reports (1892) page 792] a gift for the purpose of training men to shoot at moveable articles was held to be a gift for general public use and for a charitable purpose on the ground that it was designed to make people efficient shots so as to be able to destroy their enemies and to defend themselves at the time of war.

In *In re Susannah D. Barker, Sherrington* v. *Dean and Chapter of St. Paul's Cathedral and others* [25 Times Law Reports, page 753] a bequest to the trustees of the Royal Engineers' Institute to apply part of the income in providing prizes for competition among Royal Engineer cadets or officers was upheld as a charitable gift.

In *Beaumont* v. *Oliveira* [Law Reports, 4 Chancery Appeals page 309] legacies to the Royal Society and to the Royal Geographical Society were upheld as charitable gifts as it appeared that the object of the Royal Society was "for improving natural knowledge", and that of the Royal Geographical Society " the improvement and diffusion of geographical knowledge". The objects of both the societies were held to be objects of general public utility.

There are other judicial authorities which lay down that it is the intrinsic object of the trust and the scope of its benefit to the public which should be the guiding consideration in such cases and that an object designed to improve the mind of the public would be a charitable object. It has also been held that objects which exclude private gains, which are unselfish and are devoted to public benefit or are philanthropic, that is say, dictated by a desire to do good to the public are charitable purposes. Similarly, an establishment for increase of knowledge among men has been held to be a charity.

These cases are summed up at pages 37 to 40 of Tudor on Charities, 1928 edition.

From what I have stated above it would be observed that charitable purposes and objects of general public utility embrace a wide range and that it is not necessary that such objects should directly benefit the entire community, but it is quite sufficient if a substantial portion of the community benefits therefrom. The true test is not what the Court considers to be beneficial, for the public but what the donor considers to be beneficial, his opinion and desire being the guiding consideration in such cases.

Brighton College v. *Marriott* [1926 A.C. 192] and *St. Andrew's Hospital* v. *Shearsmith* [(1887) 2 Tax Cases 219] cited on behalf of Commissioner in my opinion, have no bearing on the present question, because they were both cases in which the question of exemption under the English Statute was considered and as

I have already observed, the scope of exemption under the Indian Act is different from that granted by the English Statute. The same remarks apply to *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891 Appeal Cases 531]; but some observations made at page 583 show that the question whether a particular purpose is or is not "charitable" is to be determined with reference mainly to the opinion and the intention of the donor, which must ordinarily be the guiding consideration in such cases and if the donor considers a particular purpose beneficial for the recipient public, which includes a section of the public, then the purpose must be held to be charitable and the Courts should not impose their own opinion to decide whether the purpose is or is not a laudable one or is not likely to be beneficial to the public.

Applying the foregoing tests to the present case I consider that the object for which the present trust has been created is an object of general public utility and therefore a charitable purpose within the meaning of the Indian Income-tax Act. The Tribune newspaper professing to follow the wishes of its founder conveys news and opinions on matters of general interest to the public, discusses matters of public interest and educates the minds of its readers in its liberal policy. Whether it achieves the object of its founder is immaterial so far as these proceedings are concerned. If it does not, remedy is elsewhere. What we have to decide is whether the purposes laid down by the founder are charitable. They, in my opinion, are objects of general public utility and the fact that the paper is not circulated free does not, having regard to the ultimate destination of the surplus, affect the question especially because no personal gain is reserved for anybody. The immediate and ultimate objects of the trust are to benefit the public by advancement of morals and improving the knowledge of the people, and this object is achieved either by publishing the newspaper or by imparting education in the Dayal Singh College. Popular conception of charity no doubt is benefit to the poor but that is not the legal conception of the term. A trust created for giving stipends in educational institutions even to sons of rich men would be a charitable trust. A grant to a University or the establishment of one would be charitable even if the University were to make surplus income by teaching and examination fees. The same remarks would apply to a College, even if fees are charged therein or to the opening of a reading room for newspaper. Publication of a newspaper is one of the several means of improving the minds of the public, the advancement of morals and the propagation of education among men and these have all been held to be charitable purposes, provided there is no personal gain reserved to anybody.

This, however does not settle the question because Mr. Jagan Nath Aggarwal on behalf of the Commissioner has raised another point which, it may incidentally be remarked has not been raised by the Commissioner. He contends that under Section 4 (3) (i) the

exemption is granted in respect of the income derived from property held under trust, that Section 6 of the Act contains the description of the different heads under which income tax is payable and income from property is one of such heads, and that by virtue of Section 9 of the Act, tax under the head "property" is payable in respect of the annual value of property consisting of buildings or lands appurtenant thereto, therefore that the property, income whereof is exempt under Section 4 (3) (i), must also be deemed to be buildings or lands appurtenant thereto. His argument is that when the same word is used in different sections of the same Act, it must be deemed to be used in the same sense. There can be no dispute with the contention of Mr. Jagan Nath that ordinarily the same expression used in different parts of an Act should be deemed to have been used in the same sense, but this cannot be an inflexible rule of construction. There may be cases where, having regard to the context, the same word can and must be held to have been used in different meanings in different sections of the same Act. An illustration of this is to be found in the Indian Income Tax Act itself, as according to Section 4 (3) (i) interest on securities, which are held by, or are 'property' of, any Provident Fund to which the Provident Funds Act applies, are exempted from taxation. Here the word "property" is used obviously in a different sense than in Section 4 (3) (i) or Sections 6 and 9. Therefore, it cannot logically be asserted that in pursuance of the ordinary rule of construction it must necessarily be deemed to have been used in Section 4 (3) (i) in the same sense as it is used in Section 9. But Mr. Aggarwal relies upon three judicial authorities in support of his contention.

In *Commissioner of Income Tax, Burma* v. *A. Eggar* [I.L.R. 4 Rang. 538] it was held that where a Professor was allowed by his employers to accept service with the University on certain conditions by virtue whereof he dedicated the whole of his salary to a charitable object, such salary at the time of its receipt by him could not be held to be derived from property dedicated to charitable purposes. It is obvious that the income of the Professor was not derived from property but from service to the university and though ultimately it was intended to be used for charitable purposes it could not be described as derived from property held under trust. The case therefore is not of material assistance in the present case.

In *In the matter of Lachhman Das Narain Das* (I.L.R. 47 All. 68), a trading firm consisted of four partners, one of whom was said to be a charitable or religious object under the name of a certain temple. It was held that the whole income of the partnership was assessable to income tax and that no part of it was exempt under Section 4 (3). The ground on which the decision appears to have been based was that part of the profits of a trading concern cannot be held to be derived from property held under a trust or legal obligation for religious purposes.

In *Commissioner of Income Tax, Madras*, v. *Arunachalam Chettiar* [I.L.R. 49 Mad. 833], it was held that if a person entrusted with funds and enjoined by the trust deed to invest them in lands and to maintain a religious or charitable institution with the income therefrom chooses to invest the funds in business, the profits derived from the business are not exempt under Section 4 (3) of the Indian Income Tax Act as charitable income. It was oberved that "English authorities are quite clear that if an institution, which primarily exists for charitable purposes, chooses to raise funds for these purposes by carrying on a business in competition with other persons who have to pay income tax, they like them would have to pay income tax notwithstanding the fact that the ultimate surplus profit is all going to the charitable object. This authority appears to support the contention of the learned counsel, but, with all respect, I feel great difficulty in agreeing with the reasoning of the learned Judges who decided the case. I have already observed that English cases on the subject of exemption from payment of income tax are not helpful in deciding the question of exemption under the Indian Income Tax Act owing to the different basis of exemption in the two countries. Therefore the view of the learned Judges of the Madras High Court which merely follows *Coman* v. *Governors of the Rotunda Hospital, Dublin* [1921 A.C. 1], is not supported by any cogent reasoning.

I have already stated that the learned Commissioner has not taken this ground; moreover this is not the view of the Government of India, because in the Income Tax Manual, 5th edition, at page 149 when discussing the question of exemption the following instruction is given to the assessing authorities :—"Under Section 4 (3) (i) income derived from property which is held under a purely religious or charitable trust or any other legal obligation that it should be utilised for a religious or charitable purpose is exempt. The word "property" in this section does not bear the restricted meaning that it bears in Section 9 of the Act but includes securities, a business or a share in a business." Probably it was in deference to this opinion that the Commissioner did not raise the point and though the opinion is not binding on us, it is an important indication of the intention of the legislature as to the meaning of the word " property " as used in Section 4 (3) (i). It is one of the cardinal rules relating to the interpretation of taxing statutes that when the meaning of an expression is not clear, a liberal interpretation should be placed on the expression and benefit of doubt should be in favour of the subject.

As I have already stated the property which vests in the trustees in this case is the Tribune Newspaper and the Tribune Press. The income is derived from this property, *i.e* , from the newspaper and the press. Even if it be assumed that the trustees are carrying on business it is the business itself which is trust property and the question of competition with others carrying on similar business does not arise in a case like the present—a question which also

appears to have influenced the learned Judges of the Madras High Court.

The counsel for the Commissioner at one stage of his argument conceded that if the income of the trustees in the present case had been derived from securities, it would have been exempt as income derived from property held under trust and his main contention was that the legislature did not intend to exempt income derived from business. I am unable to see any justification for this distinction. It does not follow from the phraseology of the section and incidentally it cuts at the root of the contention of the counsel that property in Section 4 (3) (i) must be deemed to be buildings and land appurtenant thereto.

In my opinion, therefore, the Tribune Press and the Tribune Newspaper is property which is vested in the trustees and is devoted to charitable purposes as defined in the Indian Income Tax Act, and consequently its income is exempt from assessment to income-tax.

I would answer the first question in favour of the Commissioner and the second, against him. I would leave the parties to pay their own costs.

SKEMP, J.—I agree with the answer proposed to the first question by Mr. Justice JAI LAL and have nothing to add.

As to the second question the English Income Tax cases cited on behalf of the Commissioner of Income Tax are not applicable, as has been pointed out by JAI LAL, J., but in view of the importance of the question and the fact that they have been followed in some published judgments, *e.g.*, *Lachhman Das Narain Das, In re* [I.L.R. 47 All. 68] and *Commissioner of Income Tax* v. *Arunachalam Chettiyar* [I.L.R. 49 Mad. 833], it is worth while pointing out the reasons in some detail.

The strongest and most recent case is *Brighton College* v. *Marriott* [1926 A. C. 192]. A public school was carried on by a company, which charged fees and applied its surplus income entirely to the improvement of the school; the income could not be divided among the members of the company; nevertheless this surplus income was held liable to income tax. The reason as given in the Lord Chancellor's judgment is as follows:—

"By the Income Tax Act, 1918, income tax is chargeable under Schedule D in respect of the annual profits or gains arising or accruing to any person (including a corporation) residing in the United Kingdom, from any trade, profession, employment or vocation."

His Lordship specified two exemptions under Section 37 of that Act and continued:—" By the Finance Act 1921, Section 30, exemption is granted from income tax under Schedule D in respect of the profits of a trade carried on by any charity, if the work in connection with the trade is mainly carried on

by beneficiaries of the charity and the profits are applied solely to the purposes of the charity". The appeal failed because the work was not carried on by the beneficiaries of the charity.

Similarly in the case of *St. Andrew's Hospital (Northampton)* [2 Tax Cases 219] the learned Chief Justice pointed out that the profits in the hands of the governors of a Hospital were exempt, if at all, by the words of the 105th section of the Income Tax Act, 1842. It is unnecessary to pursue a research into the English Cases further; enough has been said to show that they depend on the construction of particular exemptions in British Statutes. It is for this reason that in I. L. R. 59 Cal. 1349 their Lordships of the Privy Council said in the year 1932 :—

"Their Lordships would discard altogether the case-law which has been so painfully evolved in the construction of the English Income Tax Statutes—both the cases upon which the High Court relied and the flood of other decisions which has been let loose in this Board. The Indian Act is not *in pari materia*; it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal. Under such conditions their Lordships think that little can be gained by attempting to reason from one to the other, at all events in the present case in which they think that the solution of the problem lies very near the surface of the Act, and depends mainly on general considerations".

The only Indian case which directly supports the contention of the learned counsel for the Commissioner of Income Tax, is *Commissioner of Income Tax* v. *Arunachalam Chettiyar* [I.L.R. 49 Mad. 833 (F. B.)]. It was said :—

"The English authorities are quite clear that if an institution which primarily exists for charitable purposes chooses to raise funds for those purposes by carrying on a business in competition with other persons who have to pay income tax they like them will have to pay income tax notwithstanding the fact that the ultimate surplus of the profits is all going to the charitable object. In our opinion that is clearly laid down in *Coman* v. *Governors of the Rotunda Hospital* [(1921) 10 A.C. 1]." This last case was one under the Income Tax Act applicable to Ireland and the exemption claimed, if Schedule D applied, would have been that conferred by Section 105 of the Act of 1842. It appears to me that the difference between the English and the Indian Statutes was not sufficiently laid before those learned Judges and that the consideration that a business carried on to support a charity is in competition with other business, is irrelevant.

As to the meaning of the word "charitable" used in the Indian Income Tax Act, the word "charity" has a technical meaning in English Law derived from the preamble to the Statute 43 Eliz.: Chap. IV. That Statute was intended to provide for the

reformation of abuses in the application of property devoted to charitable uses but contained a list of charities so varied and comprehensive that the Courts used it as a sort of index or chart. (Tudor on Charities, 5th Edition, page 6). The Courts have subsequently extended the conception of charity by analogous ideas and in 1891 LORD MACNAGHTEN classified various kinds of charities in *Pemsel's* case referred to by Mr. Justice JAI LAL. I think 'charitable purposes' in Section 4 (3) (i) of the Indian Income Tax Act can hardly be confined to the English technical sense because it is laid down in Clause 4 (3) that in this sub-section 'charitable purpose' includes relief of the poor, education, medical relief and the advancement of any other object of general public utility. The relevant words to be construed are "any income derived from property held under trust...........wholly for...........charitable purposes" which include "relief of the poor, education, medical relief, and the advancement of any object of general public utility." The question is whether the maintenance of the Tribune Press and Newspaper in an efficient condition and keeping up its liberal policy fall within the words 'the advancement of any object of general public utility.' It is certainly not *ejusdem generis* with the other objects specified, namely, relief of the poor, education and medical relief. No doubt newspapers, with a few exceptions, serve a useful public function and are of public utility, but would any one call a newspaper an object of general public utility? And would any one say that efficient maintenance and improvement of a newspaper was the advancement of an object of general public utility? On the other hand, the Tribune newspaper is in this case the property from which the income is derived. The object of general public utility to be advanced can be only "the liberal policy" maintained in *Sardar* Dayal Singh's will. But what did the testator mean by "liberal policy"? Was it "liberal policy" in reference to social questions or religious questions or political questions?

As far as I am aware there is no instance in which the income of a successful daily newspaper has ever been held to be exempt from income tax, or in which such a newspaper has been held to be a charity or to exist for charitable purposes. There is certainly no such case in India. It is noted by the Commissioner of Income Tax in his reference that the assessees paid income tax for many years before they raised this point.

No daily newspaper or the policy which it promotes has ever been held to be a charity or for charitable purposes in England. The only case remotely bearing on this point is *Marsh* v. *Means* [108 Revised Reports 939]. Here the testator, by his will, gave a sum of money to be applied, after the death of his wife (who had a life interest in his whole estate) for continuing a periodical called "The Voice of Humanity." This was a quarterly periodical, the organ of an association devoted to the prevention of cruelty to animals. Only three or four numbers had been issued at the date of the will and none issued afterwards. The testator died

6 years after the will and his wife survived him. Not only the periodical itself ceased but the association perished. The Vice-Chancellor held that the legacy had lapsed and failed, and in doing so he said. "The 'Voice of Humanity' I think would fall within the description of charity if this periodical had been subsisting at the date of will and afterwards ceased." I do not think this case is of much help in dealing with a successful daily newspaper whose claim to be a charity is that it advances "the liberal policy of the said newspaper."

As to the liberal policy of the newspaper, in English Law a trust for the attainment of political objects has always been held invalid and such objects have not been recognised as charitable. (Judgment of LORD PARKER in *Bowman* v. *Secular Society Limited* [1917 A.C. 406, 442]. It is true there are a number of cases which apparently conflict with this principle but the principle has always been recognised.

The provision in the will, that the surplus income should go to an educational institution, the Dayal Singh College, if the newspaper ceased publication or in other contingencies, is irrelevant. As yet no income or surplus is being devoted to the College.

In my judgment the expression 'charitable purposes' in Section 4 (3) (i) of the Income tax Act should be construed with reference to its ordinary or dictionary sense, and as explained in the section itself, including the advancement of any other object of general public utility. The Tribune Newspaper is not a charity either in the dictionary sense or within the terms of the explanation. If the other view be adopted and the 'charity' or 'charitable purpose' be used in the sense in which they are used in English Law, still less is the Tribune Newspaper for charitable purposes.

I would, therefore, answer the second question in the negative. In view of the novelty and difficulty of the question I would leave the parties to bear their own costs.

I must add that I entirely agree with JAI LAL, J., as to the meaning of the word 'property' in Section 4 (3) (i). In construing a taxing statute, we cannot adopt, an interpretation less favourable to the subject than the Government does in its official manual.

JAILAL & SKEMP, JJ.:—We are agreed that income of the Tribune Trust is liable to be assessed in the hands of the trustees under the provisions of the Income Tax Act and also that it is an income derived from property held under trust within the meaning of Section 4 (3) of the Indian Income Tax Act. We are not however, agreed that the trust in question is for charitable purposes. We are of opinion that in view of the importance of the question this case should go to a Full Bench for decision of the point on which we are not agreed, that is to say, "whether the property in this case is held under trust for charitable purposes as that expression is defined in Section 4 (3) of the Indian Income Tax Act."

M. C. Mahajan and *D. C. Ralli*, for the assessees.

J. N. Aggarwal and *S. M. Sikri* for the Commissioner of Income Tax.

JUDGMENT.

ADDISON, J.—The question referred to the Full Bench is whether the property in this case is under trust for charitable purposes as that expression is defined in Section 4 (3) of the Indian Income Tax Act.

The Tribune is a newspaper printed at the Tribune Press in Lahore. This paper and the press were owned by Sardar Dayal Singh. He made a will, dated the 15th June, 1895. He set up a trust for establishing and maintaining a first class Arts College at Lahore. He set up another trust to found a public library. By Clause 20 of the will he set forth that "my property in the stock and goodwill of the Tribune Press and Newspaper in Anarkali, Lahore, shall vest permanently in a committee of trustees," and Clause 21 is to the effect "that it shall be the duty of the said committee of trustees to maintain the said press and newspaper in an efficient condition keeping up the liberal policy of the said newspaper and devoting the surplus income of the said press and newspaper, after defraying all current expenses, in improving the said newspaper and placing it on a footing of permanency." This reference is concerned only with the Tribune Trust. There was some litigation between the trustees and the reversioners of Sardar Dayal Singh. In that litigation there was a compromise which added that, if the paper should cease publication, the property then existing would go to one of the other trusts.

Apart from the question whether this compromise is a valid one (as it does not form a part of the will) it is obvious that it amounts to little or nothing. It is only if the paper should cease to function, that the property is to go to one of the other trusts, and the trustees are bound to see that the paper continues to be published until they exhaust all reserves and accumulations. Only then could they allow it to cease to function. It is not likely, therefore, that anything will ever go to one of the other trusts unless it be an old press.

The Tribune Newspaper was founded by the testator to set forth the liberal policy he believed in. The liberal policy he meant was probably that of the old Congress of the 'nineties.' Since his death it has been run as an ordinary business, the newspaper supplying ordinary news and setting out the political views or policy of the Hindu community or a section thereof. Whether the policy is liberal, as understood by the testator, is a question not before us. It competes with other newspapers which supply the same news at the same price, but the views of which on certain subjects, in particular, politics, may be different. There is no difference between the Tribune Newspaper and the other newspapers with which it competes except in respect of the statement

of these political views, which may or may not represent the liberal policy, which the testator meant to perpetuate, but which may be tinged with the views of the trustees for the time being for the supposed welfare of the Hindu community or a section thereof. The paper is at present flourishing and there is a surplus income which is being devoted to building up a reserve to place the paper on a footing of permanency, as desired by the testator. From this discussion it will be obvious that there is nothing charitable, as that term is understood by an ordinary man, in this trust which is run as an ordinary business concern, the surplus income being devoted to the object, expressed by the testator, of increasing the reserve fund at its disposal.

In the first place I do not think that it can be said that the testator had any desire to benefit the public. He was a man of advanced views for those days and his desire was to see that these views should be propagated for ever. He had not the fostering of knowledge in his mind; what he wished to ensure was that this pet child of his (the Tribune Newspaper) should continue to be carried on after his death and that there should be perpetual propagation of what he considered liberal political views, which, as a member of the old Congress, were dear to him.

Section 4 (3) (i) of the Income Tax Act with its proviso runs as follows:—

"This Act shall not apply to the following classes of income, namely, any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied or finally set apart for application, thereto...... ...In this sub-section 'charitable purpose' includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility".

It was asserted before us by the learned counsel appearing for the Tribune Trust that the intention of the testator was to benefit the community by setting before it liberal views and, therefore, the surplus income come within the sub-section set out, as being income derived from property held under trust wholly for charitable purposes, the object being one of general public utility. It was admitted that if this was so, a trust for the supply of canal water or electricity must also be held to be a charitable trust, the objects being of general public utility, but it was premised that such trusts in order to be held charitable, must not pay anything out of the surplus profit to individuals. It may be pointed out here that this would be a difficulty easy to get over. It was said that in the case of the Tribune Trust nothing was so paid and, therefore, the trust was a charitable one. Such a distinction, however, is not set out in the section and this argument loses sight of the fact that the surplus profits are being accumulated to strengthen the reserves of the paper and to make

it a stronger and more endurable political organ. The profits do not go to relieve distress, advance education as usually understood, or supply medical relief. They are merely to be accumulated in order to ensure that the liberal policy of the testator, as interpreted by the trustees for the time being, may continue to be disseminated. Can that be called a charitable purpose? No benefit accrues to anybody, seeing that the same news can certainly be obtained at the same price in other newspapers: and the only difference being that according to the will the Tribune should also disseminate the liberal policy of the founder, whatever that may mean. It seems to me that the answer must be in the negative.

In *Special Commissioners of Income Tax* v. *Pemsel* [3 Tax Cases 53] Lord MACNAGHTEN attempted to give a definition of 'charity'. He said 'Charity' in its "legal sense comprises four principal divisions; trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do, either directly or indirectly." This definition was discussed by LINDLEY, L. J., in *Macduff* v. *Macduff* [1896, 2 Ch. D. 451]. He said "What Lord MACNAGHTEN meant is tolerably plain. He took the classification of charities from the argument of Sir SAMUEL ROMILLY in *Morice* v. *Bishop of Durham*, and the passage in Sir SAMUEL ROMILLY's argument runs thus:—'There are four objects within one of which all charity must fall—that is to say, within one of which they must come; but he does not say everything which comes within any one of them must be a charity; that may be so or may not be so, but they must all come within one of these four heads:—..............Now Sir SAMUEL ROMILLY did not mean, and I am certain Lord MACNAGHTEN did not mean, to say that every object of public general utility must necessarily be a charity. Some may be, and some may not be ....I do not doubt that LORD MACNAGHTEN saw also, that there might be some purposes of public general utility which might be charitable and some which might not".

For example, philanthropic objects have not been held to be charitable objects. In (1931) 11 K. B. Dn. 465, an association which had widely philanthropic objects was held not to fall within any of the four principal divisions into which charity was divided by Lord MACNAGHTEN.

In *Plowden* v. *Lawrence* [1929, 1 Ch. D. 557], it was said "There are two questions that must be asked and answered: (1) Is the trust for a purpose beneficial to the community? and (2) If it satisfied that first test, is it charitable? A trust for a philanthropic purpose would satisfy the first question but not the second".

Again, it has been held that trusts for political purposes are not charitable. In *Bonar Law Memorial Trust* v. *Inland Revenue Commissioners* [41 Times Law Reports 220] Mr. Justice FINLAY said it was impossible to hold that a trust for the furtherance of the principles of a particular political party was a good charitable trust.

In *Inland Revenue Commissioners* v. *Temperance Council of Christian Churches of England and Wales* [42 Times Law Reports 618], the case of a society whose main object was 'united action to secure legislative and other temperance reforms', ROWLATT, J., held that the trust could not be held to be a charitable one. The same view was taken by EVE, J., in *Public Trustee* v. *Earl of Clarendon* [45 Times Law Reports 259].

In the case before us there is no doubt that the intention of the testator was the propagation of what he considered were liberal views in politics; these views at the end of last century corresponded roughly with the views of the Liberal Party in England. He set up this trust to propagate these views and to ensure that they would always be propagated if the trustees faithfully carried out his intentions. It is apparent that the trust is very indefinite in this respect as what is considered to be 'liberal' one day may be considered 'conservative' shortly afterwards; but it is obvious that it must be held that there was no charitable intention in the mind of the testator. These views were strongly held by him and all that he desired was that they should be continued to be propagated. This cannot be said to be a charitable purpose or an object of general public utility. It appears to me to be beyond question that, in no sense of the term can such an object be held to be a charitable one as set out in Section 4 (3) (i) of the Income Tax Act.

Some remarks of RUSSEL, J., in *National Provincial and Union Bank of England Limited* v. *Tetly* (1923, Ch D. 258), are of interest: "But must every application of the fund for a patriotic purpose be beneficial to the community and therefore charitable? It seem to me that it impossible to hold that. What is or is not patriotic is in many cases mere matter of opinion. Subsidizing a newspaper for the promotion of particular political or fiscal opinions would be a patriotic purpose in the eyes of those who considered that the triumph of those opinions would be beneficial to the community. It would not be an application of funds for a charitable purpose". These remarks apply with great force to the present case. But it was argued that the English decision could not be taken to form the basis of any decision under the Indian Act. This may be so, but the language of the Indian Act is strikingly similar to the language used by Lord MACNAGHTEN in his definition of charity. It cannot be held that the propagation of particular views, representing a liberal policy in politics, or the perpetuation of a newspaper is an object of general public utility, and that is all that the testator intended.

The Commissioners of Inland Revenue v. *Falkirk Temperance Cafe Trust* [11 Tax Cases 353] was referred to as showing that a charitable trust may trade; which is undoubtedly so. In that case the profits of trading went to give cheaper meals to the poor and indigent and the trading activities were carried on at a loss which was made good out of the income of the investments of the trust. That obviously is charity. There may, of course, be charities, the benefits of which are not wholly gratuitous, but not one reported case has been referred to, in which there is not some benefit in cash, in free or better and cheaper education, or medical relief, or in some other way whereby mankind derives some benefit without payment or for less payments. In the present case it was not contended before us that such a benefit accrued to anybody. All that was contended was that the dissemination of liberal ideas in politics by means of a newspaper sold at the ordinary market price was an object of general public utility. In the case of the present trust there is in fact no gift to the public, but a trust founded for the prepetuation of the liberal policy desired by the testator: nor do the profits go to help any one in any way. They merely go to ensure that the paper shall continue for ever. The news supplied can be obtained as cheaply by purchasing other newspapers and the propagation of the liberal views of the testator, as interpreted by the present trustees, cannot be held to be an object of general public utility. It is not education. It is the dissemination of political views, considered to be good by the testator or the trustees. But that is much too indefinite to be held to be an object beneficial to the community or a section thereof.

For the reasons given, I would answer the question referred in the negative. The Commissioner of Income Tax must have his costs.

YOUNG, C. J.—We have to consider in this reference whether the "Tribune" Press and Newspaper of Lahore comes within the meaning of Section 4 (3) and (i) of Income Tax Act, and thus escapes taxation.

I have had the advantage of reading the judgment of my learned brother ADDISON and agree with the opinion expressed by him therein.

I wish however to discuss one or two points from a slightly different point of view. The question is: Is the Tribune Newspaper held in trust "*wholly*" for religious or charitable purposes which includes relief of the poor, education, medical relief and the advancement of any other object of general public utility" within the meaning of the above section. The "Tribune" is a newspaper published mainly for the purpose of advancing the political views of the founder of the paper (as interpreted by the trustees for the time being) and also to express the opinions of the Hindu community and to advance that cause. It also publishes news and literary articles. The profits made are invested in the

newspaper itself in accordance with the terms of the trust. The newspaper is sold at the ordinary commercial rate of one anna a copy, and, like other newspapers, its profits are mainly derived from advertisements for which it presumably charges the highest rate obtainable.

In my opinion the question whether the Tribune property is held " wholly for religious or charitable porposes or for the advancement of an object of general public utility " is a question of fact. While we may consider with respect the various English authorities it is unnecessary to pay much attention to them. In such a question the subtlety of legal argument may aften obscure the point for decision. I would therefore consider this point as a question of fact and in accordance, I hope, with common sense.

In the first place is this property as described above held " wholly for religious or charitable purposes? " The emphasis in the sections is obviously laid upon the word "*wholly*." It may be that the " Tribune " advances the cause of Hindu religion in articles published by it, but no one can say the paper is published " wholly " for religious purposes. Is it published for a charitable purpose? There is no charity in charging the public or the advertiser the ordinary commercial rate. It is unnecessary to consider the various definitions of charity as laid down in the English authorities. The ordinary meaning of " charity " is clear and I would define it as " giving or providing something useful or necessary to individuals or the public at large without payment, or for a payment below the real value of the goods or services given." An example of the latter would be the famous " ninepence for fourpence " of pre-war British politics.

It is obvious that the " Tribune " Newspaper does not come within any such ordinary definition. It has however been argued that any newspaper and in particular the " Tribune " is highly educative and therefore must be held to be for the advancement of education within the meaning of this section. The " Tribune " certainly advances education in the sense that people who wish to read the paper must learn to read. Many of its articles—and I have read the paper now for over a year—certainly would come within the definition of " educative." Its leaders are well written and therefore may be considered to educate a proportion of the persons who read them. In my opinion, however, this would not bring it within the meaning of this section. The paper must be " wholly " for charitable purposes. No one can say that the " Tribune " always, and in every part, is educative. Some of the advertisements appearing in it for instance would hardly come within the definition of " education " or of literature. To come within the section, " education "—or *any* object of public utility—must be considered in conjunction with the word " charitable," that is, the education given must be free or at any rate lower than the commercial rate. There are schools in England and elsewhere where property is held in trust for the free education of certain scholars.

These institutions take other pupils at ordinary commercial rates. I think it would surprise the boys who attend these establishments to be told that their school was a "charity school." It is quite clear that such a school is not "wholly" for charitable purposes. Equally the "education" provided by the "Tribune" is not "wholly" for charitable purposes nor is the purpose of the paper "wholly" one of education.

It has been also argued that the "Tribune" newspaper is a public utility, In the first place, as I have said, a public utility must have charitable basis to come within the meaning of the section. If it were not so, Railways, Shipping, Electrical Supply, and Water Supply Companies could form a trust and escape income tax by putting their profits to reserve, or utilise them by paying salaries to their members. There is nothing charitable in the "Tribune" Newspaper which can be held to be of general public utility.

It cannot therefore be said that the "Tribune", or any other ordinary newspaper—even though held in trust is a general public utility within the meaning of the section.

Lastly, the trustees of the "Tribune" are men of ability. It had not occurred to them for over 35 years to suggest that the "Tribune" was either a charity or public utility. Like good citizens they have hitherto paid taxes without protest.

As a matter of fact therefore, I hold that the "Tribune" Newspaper and the Tribune Press cannot be said to be held by the Trustees "*wholly* for religious or charitable purposes" which includes "the advancement of education or any other object of general public utility."

I would answer the question put to us in the negative. The Commissioner of Income Tax to have his costs.

TEKCHAND, J. :—On a difference of opinion between JAI LAL and SKEMP, JJ., the following question has been referred to the Full Bench for decision under Clause 26 of the Letters Patent :—

"Whether the property in this case is held under trust for "charitable purposes" as that expression is defined in Section 4 (3) of the Indian Income Tax Act".

The property in question consists of the *Tribune* newspaper and the *Tribune* Press, which admittedly vest in a Committee of trustees, appointed under the will of the founder, the late *Sardar* Dayal Singh Majithia, *Ries* and Jagirdar of Lahore. The newspaper was started by the *Sardar* in the early eighties of the last century and used to be printed at a press owned by him. The press and the paper continued to be the private property of the *Sardar* in his life-time. On the 15th June, 1895, three years before his death, the *Sardar* executed a will by which he created three separate trusts, which were to be administered by three independent committees of trustees. For each trust he bequeathed

certain properties, which were to vest in the Committee concerned. The three trusts were created for the following purposes respectively :—

(1) establishing "non-denominational" College for the spread and dissemination of sound liberal education in this province, whether an attempt shall be made to inculcate pure morality and the principles of Theism consistent with the tenets of the Brahmo religion ;"

(2) founding a Public Library open to the general public "in which no charge shall be levied for the perusal of books and newspapers and magazines during certain hours"; and

(3) maintaining the *Tribune* newspaper and Press in an efficient manner and placing it on a footing of permanency".

It is this last trust (No. 3) with which we are concerned in this reference. The clauses of the will dealing with this trust run as follows :—

(XX) "That my property in the stock and good-will of the *Tribune* Press and Newspaper in Anarkali, Lahore, shall vest permanently in a Committee of Trustees consisting of the following :—

(XXI) "That it shall be the duty of the said Committee of Trustees to maintain the said Press and Newspaper in an efficient condition, keeping up the liberal policy of the said newspaper, and devoting the surplus income of the said press and newspaper in improving the said newspaper and placing it on a footing of permanency."

The *Sardar* died in September 1898, and in April 1900 the Chief Court of the Punjab granted to his executors probate of the will, overruling various objections raised by the widow of the deceased (see 63 P. R. 1900). The caveator appealed to the Privy Council but the appeal was dismissed (84 P. R. 1903 P. C.). Subsequently the widow and certain relations of the deceased instituted a civil suit, contesting the validity of the will. This suit was eventually settled by a compromise, whereby it was agreed that in case the *Tribune* newspaper ceased to function or for any other reason its surplus income as well as that of the press could not be applied to the objects mentioned in Clauses 20 and 21 of the will they would be applied for the maintenance of the College, for establishing which another trust had been created by the *Sardar* as mentioned above. This compromise was accepted by the Court and its terms embodied in the decree passed by it.

The *Tribune* trust has been functioning from the death of the *Sardar* and both the press and the newspaper appear to have flourished under the management of the trustees. It seems that since 1917-18 there has been surplus income, which has been assessed annually to income tax. The trustees paid the tax without demur

till the year 1931-32. In 1931-32, however, they objected to the assessment, urging that the "*Tribune* newspaper and press" was property held under trust "for the advancement of an object of general public utility" and, therefore, its income was exempt from assessment under Section 4 (3) (i) of the Indian Income Tax Act. The Assistant Commissioner overruled the objection and confirmed the assessment. The Commissioner also upheld the order, but under Section 66 (2) of the Act he referred the question to the High Court. The reference came up for hearing before a Division Bench of this Court, presided over by JAI LAL and SKEMP, JJ., who expressed divergent opinions. JAI LAL, J., took the view that the income of the *Tribune* Press and newspaper fell within the exemption, while SKEMP, J., came to a contrary conclusion. They accordingly referred the question to the Full Bench for decision under Clause 26 of the Letters Patent.

The decision of the question depends upon the proper interpretation of Section 4 (3) of the Indian Income Tax Act, which reads as follows:—

" This Act shall *not* apply to the following classes of income:— (1) Any income derived from property held *under trust* or other legal obligation wholly for religious or *charitable purposes*, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for the application, thereto. * * * * " " In this sub-section 'Charitable purpose' includes relief of the poor, education, medical relief and *the advancement of any other object of general public utility*.

It will be seen that in order to support a claim for exemption from assessment under this sub-section, it is necessary to establish

(*a*) that the property, from which the income in question was derived, is *held under trust*;

(*b*) that such trust is for

(I) religious, or
(II) *charitable* } purposes; and

(*c*) that the property is held for such purposes either *wholly* or *in part*. If it is proved to have been held *wholly*, for one of the purposes mentioned in (*b*) above, the exemption must be granted, regardless of whether the income has been actually set apart, or applied, for such purpose. If, however, the trust is partially for a religious or charitable purpose, the exemption can be claimed only if the income has been either actually applied, or "finally set apart" for such purpose.

It is beyond dispute that condition (*a*) is fulfilled in this case. As already stated, the property is held under one of the trusts created in accordance with the will of the late *Sardar*, and vests in the Committee of trustees for the purposes of the trust. By an arrangement arrived at between the heirs of the founder and the trustees, and sanctioned by the Court, in the event of the newspaper ceasing to function, or the purpose of the trust otherwise

failing, the income of the properties concerned is to be utilized for the maintenance of the Arts College, founded out of the other benefactions of the *Sardar*. Under no circumstances, are the trustees, or the heirs or representatives of the deceased founder, or any other person, to derive any private or personal gain from the trust properties or the income thereof. The dedication is complete and full. If, therefore, the trust can be said to have been established for one or other of the purposes mentioned in (*b*) above the first part of condition (*c*) also must be taken to have been satisfied.

The real point in controversy is whether the trust falls within one of the classes mentioned in (*b*). Its purpose is certainly not religious, nor is it claimed to be so by, or on behalf of, the assessee. The question is whether it is "charitable" as defined in sub-Section (3) of Section 4 of the Act.

Now if the word "charitable" were used in the Indian Income Tax Act in its ordinary popular sense, I have no doubt that the question must be answered unhesitatingly in the negative. In common parlance, "charitable" always involves the idea of help to the poor and the needy; of relief of destitution and distress; it is associated with alms-giving, and has an eleemosynary basis. Obviously, founding, maintaining or "placing on a footing of permanency" a newspaper is not an object of this kind. It is clear, however, that in sub-Section (3) of Section 4 of the Act, the expression "charitable purposes" has a different and wider meaning. The definition given in the sub-section is not exhaustive. It *includes*:

(i) relief to the poor;

(ii) education;

(iii) medical relief; and

(iv) *any other object of general public utility.*

Of the four purposes enumerated in the definition the first and the third, *viz.*, 'relief to the poor' and 'medical relief' necessarily involve the idea of charity as used in the popular sense. This is clear from the words used. But it is equally clear that this is not an essential attribute of the second or the fourth purpose, *i.e.*, 'education' or any other object of general public utility'. In cases relating to trusts falling in these two latter categories there may or may not be an eleemosynary basis in the purpose to which the income of the trust properties is to be applied. This is one of the important points, which must be kept in view in determining whether a particular trust falls within either of these two classes. In Section 4, the legislature has deliberately refrained from qualifying in any way the words, 'education' and 'any other object of general public utility', and there is nothing in the context which indicates that it was

intended to give them a restricted meaning. It is, therefore, not open to the Courts or other authorities, whose duty is to interpret the section, to cut down the plain and comprehensive meaning of the words used, simply because this will give to the expression 'charitable purpose' a meaning which is not in accord with popular notions. Obviously in this and several other statutes these words are used in a technical sense and in interpreting them it will be useful to bear in mind the observations of their Lordships of the Privy Council in *Verge* v. *Somervill* [L.R. (1924) A.C. 496]. That case came on appeal from the Supreme Court of New South Wales, and the question involved was whether a certain bequest created a 'charitable trust'. LORD WRENBURY in delivering the judgment of their Lordships, remarked (P. 502):—

"In fact, the legal meaning and the popular meaning of the word 'charitable' are so far apart that *it it necessary almost to dismiss the popular meaning from the mind as misleading*, before setting out to determine whether a gift is charitable within the legal meaning".

It has been argued that the definition of "charitable purposes" as given in Section 4 of the Indian Income Tax Act appears to have been taken from the well-recognised classification of "charities" in English Law, and, therefore, the section must be interpreted subject to the limitations and reservations laid down in the various English rulings bearing on the subject. This argument is not wholly correct and cannot be accepted in its entirety. It is no doubt true the wording of the definition in the Indian Act is in several respects similar to that used in some of the leading English cases on the subject, but the two are not identical in all respects. There is a material difference in the description of the fourth head or classification and it seems to me that this makes all the difference in cases like the one before us.

In England the *locus classicus* on the subject is the famous case of *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891 A.C. 531 (580)] decided in the House of Lords. In that case Lord Macnaghten after explaining that the popular meanings of the word "charity" and "charitable" do not coincide with their legal meaning and that when used in such expressions as "charitable uses", "charitable trusts", or "charitable purposes" the word has a well-settled technical meaning, observed:

"Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads".

The fourth head of this classification has been the subject of much discussion in cases in England. In some of them it has

been held to be synonymous with 'philanthropic,' while in others it has been given a narrower meaning. Of the cases of the latter class, the most important is *In re Macduff* [L. R. (1896) 2 Ch. 451] on which Mr. Jagan Nath naturally laid much stress. In that case it was held that while a charitable purpose may well be a purpose of general utility, all purposes of general utility cannot be deemed to be charitable. It was observed that the words "public utility" are so large that they comprehend purposes which are not charitable (p. 456). This view was affirmed on appeal, and with regard to *Pemsel's case*, Lord Justice LINDLEY observed: "I am certain that Lord MACNAGHTEN did not mean to say that every object of public general utility must necessarily be charitable. Some may be and some may not be so." The same view was expressed in *Plowden* v. *Lawrence* [L. R. (1929) 1 Ch. 557 (569)] and *Keren Kayemeth Le Jisroel Limited* v. *Commissioners of Inland Revenue* [L.R. (1931) 2 K.B. 465].

Of the cases cited by Mr. Mehr Chand, the most important is the *Commissioners of Inland Revenue* v. *Falkirk Temperance Cafe Trust* [11 Tax Cases 353]. In that case Lord Ashmore observed at page 370:—

"The fourth head of Lord Macnaghten's four-fold classification is vague because of its generality, but the following definition is helpful because it directs attention to characteristics of charity in its judicial sense: "The essential attributes of a legal charity", said Lord Justice Fitzgibbon, "are in my opinion that it shall be *unselfish*, that is, for the benefit of other persons than the donor; that it shall be *public*, that is, that those to be benefited shall form a class worthy, in numbers of importance, of consideration as a public object of generosity; and that it shall be *philanthropic* or *benevolent*, that is, dictated by a desire to do good: *Webb* v. *Oldfield* [(1898) 1 Ir. Rep. 431 (446)]".

I do not think much useful purpose will be served by referring to the other English cases dealing with the subject, or in attempting to reconcile the *dicta* of eminent Judges contained in some of them. It will be sufficient for our present purposes to say that the Indian Legislature appears to me to have steered clear of these difficulties by using phraseology which is much wider and more comprehensive than that of Lord Macnaghten's fourth head of classification. It was in 1896 that Lord Lindley and the other Law Lords held in *Macduff's Case* that the words "general public utility" were very wide in their scope, that every object of public utility was not necessarily a "charitable purpose," and yet twenty-two years later, in 1918, when the *Explanation* to Section 4 (3) of the Indian Income Tax Act was placed on the Statute-book, the Indian ligislature, while practically adopting Lord Macnaghten's phraseology in enumerating the first three heads of the definition, described the fourth as "advancement of other objects of general public utility", without any

restriction or qualification whatever. Nor have we in India any statutory provisions corresponding to the well-known Statute of Elizabeth (43 c. 4) or the Mortmain and Charitable Uses Act, 1888, which doubtless have largely influenced many of the English decisions on the subject. We in India are not hampered by any such considerations, and think it is our duty to give full effect to the plain meaning of the words used in Section 4 (3) of the Act.

In the case before us there can be no question as to the *unselfish* and *philanthropic* nature of the benefaction. The founder, evidently actuated by a desire to do good, dedicated completely and irrevocably, valuable property for what he believed to be to the benefit of others, without reserving to himself, his heirs, representatives or relations, or any other individual or individuals, personal or selfish gain of any kind whatever. It is equally clear that the 'purpose' of the trust is of a 'public' character.

It is common ground that it is not necessary that the object should be to benefit the whole of the mankind or all the persons living in a particular country or province. It is sufficient if the intention is to benefit a sufficiently large section of the community, as distinguished from specified individuals.

All this was not seriously disputed before us by Mr. Jagan Nath, but he contended that maintaining a newspaper cannot be regarded as "advancement of an object of general public utility," especially when it has been enjoined to pursue a particular policy. After giving careful consideration to the arguments of the learned counsel, I do not think that this contention is sound. I agree with JAI LAL, J., that a trust of a public character, in which no immediate or ultimate personal benefit of any kind is reserved to any individual, created with the object of founding and maintaining a paper, which conveys news and opinions on matters of general interest to the public, discusses matters of public interest, and educates the minds of its readers on lines, which the founder considered to be beneficial to the public at large, is a trust for "the advancement of an object of general public utility," as that expression is understood in law. It is worthy of note that under the more restricted provisions of the English Law, a gift for the purpose of maintaining a periodical called the "Voice of Humanity" was held to be charitable (*Marsh* v. *Means*, 108 R. R. 939).

In para. XXI of the will the testator has laid down that the trustees "shall keep the *liberal policy* of the said newspaper" and there was much discussion before us as to whether this meant the policy of the Indian National Congress of the time when the testator created the trust, which corresponds, more or less, to the policy of what is now known as the "Moderate School" of politicians in India, and whether the *Tribune* has actually pursued that policy since the death of *Sardar* Dayal Singh. In my opinion, these matters are not relevant to the decision of the point referred to us, and I do not think it necessary to express any opinion on them,

even if it were possible to do so, in the absence from the record of any materials bearing thereon. It is not for us to decide whether the particular ideas which the founder wanted to be propagated through this newspaper and the policy which he desired to be "kept up" by it, are in fact beneficial to the public, whom he intended to benefit. If the purpose indicated is "legally charitable," the Court is not concerned to enquire whether it is actually beneficial (*Tudor on Charities* p. 8 and the cases cited therein). Obviously the Court cannot say whether in political, social or other matters affecting the welfare of the community, a 'liberal policy,' or a 'conservative policy' or a 'radical policy' would be more beneficial. As observed by CHITTY, J., in *In re Foveaux Cross* v. *London Anti-Vivisection Society* [L.R. (1895) 2 Ch. 501]: "In determining the question of charity the Court does not enter into, or pronounce any opinion on the merits of the controversy which subsists between the supporters and opponents of a particular view. In this matter "it stands neutral." In that case the question was whether a gift to certain societies was a gift for a 'charitable purpose.' Those societies had been formed with the object of agitating for the total abolition of the practice of vivisection. The question was raised whether such an object could be considered to be one "beneficial to the community." The learned Judge held that in deciding this matter the determining consideration was the intention of the donor and not what the Court thought of it. "The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community: whether, if they achieved their object, the community would, in fact, be benefited is a question on which I think the Court is not required to express an opinion" (p. 507).

Nor are we concerned in these proceedings with the question whether the trustees have kept up the 'liberal policy' of the founder, as laid down in his will. If the Crown, or any person interested in the trust, thinks that this is not so, the law provides ample means of seeking redress.

Much stress was laid on the fact that the '*Tribune*' is sold for a price which is the same as charged by other newspapers of similar size, and that a portion of its income is derived from advertisement. It was urged that to all intents and purposes it is a "commercial concern", which competes in the market with other newspapers and presses which are liable to pay income tax and that it could not have been the intention of the legislature that the profits earned by it should escape assessment. I think, none of these circumstances affects the matter. The fact that the newspaper is not supplied free to the poor and the needy, or that it is not sold to the public at cost price, would be material only if the word "charitable" were to be taken to have been used in the Act in the popular meaning; but it has been shown above that this is not the case. It is probable though there is no proof of it on the record, that a part

of the income, now sought to be assessed, was derived from advertisements in competition with other newspapers and presses, whose profits are liable to be assessed. But this again seems to me to be immaterial, for the *Tribune* stands on an entirely different footing. Admittedly the property of the *Tribune* is held in trust in which the possibility of private gain is completely eliminated while most of the rival presses and papers are run by private persons or limited companies, in which the whole or a part of the profit eventually passes into private pockets. The Indian Legislature has exempted from assessment trusts of a public character, founded for the advancement of objects of general public utility, and not privately owned commercial concerns, even though formed for a purpose which may incidentally benefit the public.

In the course of the argument before us, a large number of English rulings were cited by both counsel, but I do not think it necessary to discuss them in detail here. It will be sufficient to say that such of those rulings, as dealt with the question of 'exemption' from assessment, are not of much assistance, as the words of the Indian Act in this behalf are not in *pari materia* with those of the English Statute. The exemption under the Indian Law is much wider than in England. Under Section 4 (3) of the Indian Income Tax Act, income of property held under trust for a charitable purpose is exempt, however it might have been earned. Under Section 37 of the English Act the exemption extends only to the "yearly interest or other *annual payment* forming part of the income of a trust established for charitable purposes". There are other points of difference also in the two Acts. It is, therefore, clear that cases in which exemption was sought and not granted in England cannot be implicitly followed in interpreting the Indian Act.

It may be incidentally mentioned that the scope of the exemption under Section 37 of the English Act has to some extent been enlarged by Section 24 of the Finance Act of 1927, according to which profits of a trade exercised in the course of carrying out of the primary object of the charity are no longer assessable, provided the profits are applied solely for the purposes of the charity. This amendment has rendered obsolete many of the earlier English rulings including, I think, the leading case of *Coman* v. *Governors of the Rotunda Hospital, Dublin* [L.R. (1921) A.C. 1] which had laid down that it is not the motive of a concern, but whether it is run on 'business lines' and adopts business methods that decided the liability to tax. Under the Indian Act it seems to me clear that a 'business' is exempt if it is held under trust for a charitable or religious purpose.

Some of the other English cases cited laid down that gifts for political purposes, *e.g.*, the "Primrose League" of the Conservative party [43 T. L. R. 259] or the "Bonar Law Trust" [49 T.L.R. 220] were not 'charitable' or that every 'partriotic' or 'public' purpose was not necessarily 'charitable'. In the

English reports numerous cases are to be found which are not reconcilable with these decisions, but I do not think it necessary to pursue the discussion, as in India we have clear statutory provisions which do not expressly or by necessary implication exclude trusts for 'political' or 'patriotic' purposes from objects of 'general public utility' as used in Section 4 (3).

Another set of English cases cited, related to the question whether certain trusts, alleged to have been created for "public or charitable purposes" were void for uncertainty or other causes. This matter is not raised in this reference, and therefore these cases are irrelevant.

In the order of reference the learned Commissioner relied on *Umar Bakhsh* v. *Commissioner of Income Tax*, [I. L. R. 12 Lah. 725] but that case is clearly distinguishable, as there the income of the *waqf* property was spent on the maintenance of the founder and his children. Similarly in *Hotz Trust of Simla* v. *Commissioner of Income Tax* [11 Lah. 725] referred to by Mr. Jagan Nath, the trust concerned was for the continuance and maintenance of a certain hotel business, the profits of which were to be accumulated for a number of years and then distributed among the beneficiaries in certain proportions.

After giving the case anxious and careful consideration I am of opinion that the income of the trust in question is exempt from assessment under Section 4 (3) of the Indian Income Tax Act, and I would answer the reference in the affirmative.

Having regard to all the circumstances I would leave the parties to bear their own costs in this Court.

ORDER OF THE COURT :—The order of the Court is that the question referred be answered in the negative and the parties bear their own costs in this Court.

Reference answered in the negative.

[IN THE CALCUTTA HIGH COURT.]

AHMADPUR KATWA RAILWAY CO., LTD., *In re.*

Sir Harold Derbyshire, C.J., and Costello, J.

April 2, 1935.

RAILWAY COMPANY—SUBSIDY PAID BY STATE FOR PAYMENT GUARANTEED INTEREST ON SHARE CAPITAL—WHETHER 'INCOME' —ASSESSABILITY—INTEREST ON BORROWED CAPITAL—INDIAN INCOME TAX ACT (XI of 1922), SEC. 10 (2) (iii).

Under an agreement between the Secretary of State for India and the assessee, a railway company, the latter agreed to find a certain sum of money and to hand it over to the former for consructing and operating a railway. The agreement provided, inter alia, *that if the net profits of the company shall not be sufficient to pay interest on the paid-up capital of the company at the rate of 3½ per cent. per annum, the Secretary of State will pay the company in addition to the net profits of the company for such year such a sum as shall with the net profits, make up an amount equal to interest for such year at the rate of 3½ percent. per annum on the paid up share capital of the company. The income tax authorities levied income tax not only upon the earnings of the company but also upon the subsidy received from the state. The company claimed they were not assessable in respect of the subsidies. On a reference by the Commissioner of Income Tax:*

Held (*i*) *that the subsidy was income of the company and was liable to be taxed in spite of the fact that it was intended to be paid automatically to the shareholders* ; (*ii*) *that the guaranteed interest payable to the shareholders was not deductible under Section 10* (*2*) (*iii*) *of the Indian Income Tax Act*; (*iii*) *that the profits earned by the company, independently of the State subsidy, were clearly taxable as the company's profits.*

Cases referred to :

BLAKE *v.* IMPERIAL BRAZILIAN RAILWAY CO. [2 Tax Cas. 58.]

NIZAM'S GUARANTEED STATE RAILWAY *v.* WYATT [2 Tax Cas. 584].

PRETORIA PETERSBURG RAILWAY CO., LTD. *v.* ELGOOD [98 L. T. 741.]

SOUTH SLANHAIRAN COLLIERY CO. In re [12 Ch. D. 503.]

Reference made by the Commissioner of Income Tax, Bengal under Section 66 (2) of the Indian Income Tax Act, XI of 1922.

STATEMENT OF CASE.

"Messrs. McLeod and Co., Managing Agents of the five Light Railway Companies set out below have asked me to state a case

under Section 66 (2) of the Income Tax Act in respect of the assessments for the year 1933-34 on the income of those Railways. The Railways in question are:—

1. The Ahmadpur Katwa Railway Co., Ltd.
2. The Katakhal Lalabazar Railway Co., Ltd.
3. The Bankura Damodar River Railway Co., Ltd.
4. The Kalighat Falta Railway Co., Ltd.
5. The Burdwan-Kutwa Railway Co., Ltd.

The appeal in all 5 cases was heard simultaneously and one joint order was passed and in view of the fact that the assessments in question fall in two categories, I propose to state a case under that section and sub-section only in respect of two Railway Companies, *viz.*, The Ahmadpur Katwa Railway Co., Ltd., and the Katakhal Lalabazar Railway Co., Ltd., one of which falls in each category and to determine the question at issue in the other cases in accordance with the decision of Their Lordships in these two cases.

2. Below is a table setting out under head E, the total income assessed in each of the cases, while B, C and D show how that total income has been computed.

Companies.	Adjusted profits as per accounts exclusive of State-Railway			Adjusted loss as per accounts before including State Railway			State subsidy.			Total Income.
(A)	(B)			(C)			(D)			(E)
	Rs.	A.	P.	Rs.	A.	P.	Rs.	A.	P.	Rs.
1. Ahmadpur Katwa Railway Co., Ltd.	5,277	8	6	...			55,062	7	6	60,340
2. Katakhal Lalabazar Railway Co., Ltd.	...			6,436	13	3	46,536	5	3	40,099
3. Bankura Damodar River Railway Co., Ltd.	...			19,247	2	3	1,38,247	2	3	1,19,000
4. Kalighat Falta Railway Co., Ltd.	...			16,649	12	3	74,399	12	3	57,750
5. Burdwan Kutwa Railway Co., Ltd.	31,366	8	0	...			30,933	8	0	62,300

3. In each of the two assessments in respect of which I am stating a case either the whole or a part of the subsidy received by the Company from the Secretary of State for India has been assessed. In the first case, the Companies' accounts disclosed profits exclusive of the Government subsidy and the total income assessed in this case is the aggregate of such profit and of the State subsidy, while in the second case, where the accounts disclosed a

deficit, the income assessed by the Income Tax Officer is the difference between the State subsidy and the deficit thus disclosed.

4. In the first case, the assessee's contention is that both the profits disclosed in the accounts and the State subsidy should have been exempted from taxation in the hands of the company and in the second case his argument is that the balance of the subsidy left over after deducting therefrom the working deficit should be so exempted. In both cases he argues that the State subsidy is not taxable in the hands of the company and in the first case he also contends that even the trading profits earned by the company apart from the State subsidy are not taxable.

5. The assessee argues that the State subsidy is not taxable in the hands of the company because it is paid by the Secretary of State for India under the terms of the agreement between the Company and the Secretary of State to make up the minimum guaranteed interest payable to the shareholders and that this being the case, the company is merely a trustee on behalf of the shareholders and that accordingly such guaranteed interest when received by the shareholders constitute their income taxable in their hands, but is not the income of the company. In the alternative it is argued that if the State subsidy is the company's income, the guaranteed interest payable to the shareholders is a legitimate deduction against the company's income under Section 10 (2) (iii) of the Act as interest paid on borrowed capital.

6. The assessee company has formulated under Section 66 (2) of the Act a number of questions which I append to this statement of case (marked 1 and 2). As these questions, however, as framed mostly raise only questions of fact, I do not propose to refer any of them in that form, and in my view, only 3 questions of law really arise and these may be formulated as below :—

(1) Whether on a proper construction of the terms of the agreement between the company and the Secretary of State for India in Council the subsidy paid by the latter is the "income" of the former ?

(2) Whether the "guaranteed interest" payable to the shareholders is deductible under Section 10 (2) (iii) of the Income Tax Act ?

(3) Whether the profits earned by the company independent of the State subsidy are in the circumstances of the case taxable or not as the company's profits."

7. I append to this statement of case (marked 3) a copy of the agreement dated the 8th May, 1922 between the Secretary of State for India in Council and the Ahmadpur Katwa Railway Co., Ltd., and also of the agreement dated the 19th May 1923 between the Secretary of State for India in Council and the Katakhal Lalabazar Railway Co. Ltd., the latter including a subsidiary agreement between the Secretary of State and the Assam Bengal

Railway relative to the working and management of the assessee company.

8. The material clauses of the indenture between the Secretary of State and Ahmadpur Katwa Railway Co., Ltd. are Clauses 21, 27, 29 and Schedule II, Clauses 3 and 4 which I set out in extenso below:

"As to capital of Company and capital expenditure.

21. The company shall within such period and by such instalments as the Secretary of State shall prescribe pay into such Government Treasury or Treasuries in India as the Secretary of State shall prescribe an aggregate sum of Rs. 17,25,000 or such less sum as the Secretary of State shall deem (?) sufficient (deducting therefrom the amount payable to the promoters for their commission and legal and other expenses, and all other expenses referred to in Clause 25) to be raised in shares as the original capital of the company.

27. All moneys whatsoever from whatsoever source arising or derived and whether attributable to account of capital or revenue, which shall during the continuance of this contract be received by the company on account of the said railway, or the business thereof shall be paid without deduction at such time and in such manner as the Secretary of State may from time to time direct into some Government Treasury or Treasuries in India to be from time to time approved for the purpose by the Secretary of State.

29. All moneys which the company shall require to defray expenditure by the company under this Contract sanctioned by the Secretary of State shall be supplied to the company by the Secretary of State in India according to such arrangements as shall from time to time be made between the Secretary of State and the company.

Schedule II, Clause 3.—The net earnings of the said railway as defined in Clause I of this contract together with receipt on account of transfer fees, if any, and such interest as may accrue during the half-year, from investment or deposit in banks and any profits realised on the sale of any such investments referred to in Clause 30 of the above-written indenture less such sum as may be payable by way of interest on debentures if any shall constitute the net receipts of the company for the said half-year and shall be applied by the Secretary of State in manner and subject as hereinafter appearing.

If in any year during the continuance of this Contract commencing from the first half year after the close of the period during which interest is payable out of capital under Clause 4 of this schedule whether interest under the said clause is paid or not:—

(i) the net receipts of the company shall exceed the minimum amount sufficient to pay interest on the paid-up share capital of the company at the rate of 5 per cent. per annum such excess shall be divided equally and one moiety thereof shall be retained by and belong to the Secretary of State and the other moiety shall be paid to the company.

(ii) the net receipts of the company do not amount to a sum sufficient to pay interest as aforesaid at the rate of 5 per cent. per annum the whole of such net receipts shall belong to and be paid to the company.

(iii) the net receipts of the company shall not be sufficient to pay interest on the paid-up capital of the company at the rate of 3½ per cent. per annum the Secretary of State will pay to the company in addition to the net receipts of the company for such year such a sum as shall with the said receipts make up an amount equal to interest for such year at the rate of 3½ per cent. per annum on the share capital of the company for the time being paid-up provided always that the Secretary of State shall be at liberty to apply any moneys payable to the company under this clause to any of the purposes for which the company are under this contract bound to provide the funds, in case there shall be no capital money in the Government Treasury at the time available and also to deduct from any such moneys all moneys (if any) which shall for the time being be owing to the Secretary of State by the company under this contract and which the company ought to have paid, but shall have failed to pay into any Government Treasury in India. All moneys so retained and applied or deducted shall be afterwards recouped to the company out of capital as soon as the same shall have been paid into Government Treasury.

Payment under this clause shall be calculated at the close of each year but payments on account and subject to adjustment may be made at the close of the first half of each year.

Clause 4.—The company (so far as authorised so to do by its constitution, and subject to the law for the time being in force in British India) may during a period which shall extend to the close of the half-year in which the said railway shall be actually completed and opened throughout for the public carriage of passengers and goods in accordance with the provisions hereof, pay out of capital any sums by way interest on the amounts from time to time *bona fide* paid-up on the share capital of the company for the time being issued, not amounting, together with the interim net earnings of the said railway and with any interest received by the company from any investments of any moneys raised for the purposes of this agreement and from any bank or banks in which any such moneys are deposited and any profits realised by the company on the sale of any such investments as aforesaid and any other miscellaneous receipts of the company in the nature of revenue for the period in respect of which such

interest is paid, to more than 4 per cent. per annum on the sums in respect of which the interest is paid. The sums paid out of capital under this clause may be charged to capital account as part of the orignial cost of construction."

In the case of the second company the most material clauses are Schedule II, Clauses 3 and 4 and also Clause 25 of the subsidiary agreement between the Secretary of State and the Assam Bengal Railway Company, which I also set out below in extenso :—

APPLICATION OF GROSS EARNINGS.

Schedule II, Clause 3. Out of the gross earnings of the said Railway, or any part thereof, the Secretary of State shall in each half-year retain 50 per cent. as is in Clause 23 of the Contract set forth in Schedule III hereto attached provided to be paid over to the working agency therein referred to which percentage so retained shall be in full satisfaction of and as remuneration for the use of all necessary rolling stock and machinery (other than fixed machinery, and for working, managing and fully and efficiently maintaining, renewing and upholding the said railway and railway stations, station yards, sidings, crossing places, bridges, viaducts, offices, warehouses, houses for employees, fixed machinery, tools and plant, office furniture and equipment, conveniences and works for the use of the said railway whenever provided and the remainder of such gross earnings for each half-year shall be the net earnings of the said railway for the said half-year"

GUARANTEE.

4. The net earnings of the said railway as defined in clause 3 of this schedule together with receipts on account of transfer fees, if any, and such interest as may accrue during the half-year on the unexpended capital of the company referred to in Clause 22 of the scheduled contract less such sum as may be payable by way of interest on debentures if any shall constitute the net receipts of the company for the said half-year and shall be applied by the Secretary of State in manner and subject as hereinafter appearing.

(a) When the net receipts of the company in any year shall exceed the minimum amount sufficient to pay interest on the paid-up share capital of the company at the rate of 5 per cent. per annum such excess shall be applied towards the payment of office expenses and the expenses of management and direction of the company up to the limit provided for in clause 6 of this Schedule and the balance if any shall be divided equally and one moiety thereof shall be retained by and belong to the Secretary of State and the other moiety shall be paid to the company.

(b) When the net receipts of the company for any year do not amount to a sum sufficient to pay interest as aforesaid at

the rate of 5 per cent per annum the whole of such net receipts shall belong to and be paid to the company.

(*c*) If in any year during the continuance of this Contract commencing from the first half-year after the close of the period during which interest is payable out of capital under Clause 5 of this schedule whether interest under the said clause is paid or not the net receipts of the company shall not be sufficient to pay interest on the paid-up share capital of the company at the rate of 3½ per cent. per annum the Secretary of State will pay to the company in addition to the net receipts of the company for such year such a sum as shall with the said net receipts make up an amount equal to interest for such year at the rate of 3½ per cent. per annum on the share capital of the company for the time being paid up; provided always that the Secretary of State shall be at liberty to apply any moneys payable to the company under this clause to any of the purposes for which the company are under this contract bound to provide the funds, in case there shall be no capital money in the Government Treasury at the time available, and also to deduct from any such moneys all moneys (if any, which shall for the time being be owing) to the Secretary of State by the Company under this contract and which the company ought to have paid, but shall have failed to pay into any Government Treasury in India. All moneys so retained and applied or deducted shall be afterwards recouped to the Company out of capital as soon as the same shall have been paid into the Government Treasury.

(*d*) If in any year during the ten years commencing from the first half-year mentioned in the foregoing Clause 4 (*c*) the net receipts of the company shall not be sufficient to pay interest on the paid-up share capital of the company, at the rate of 4½ per cent. per annum the Secretary of State will pay to the Company in addition to the sums if any so paid by him under the aforesaid clause a further sum out of the revenues of the Assam Administration which shall with the said net receipts and the said sums paid by the Secretary of State under the aforesaid clause make up an amount equal to interest for such year at the rate of 4½ per cent. per annum on the share capital of the company for the time being paid up.

Payments under this clause shall be calculated at the close of each year but payments on account and subject to adjustment may be made at the close of the first half of each year.

GUARANTEE.

"Clause 25.—Notwithstanding anything contained in the principal contract the Secretary of State shall be entitled to be paid by the company out of the revenue of the Assam Bengal Railway in respect of and at the end of each year commencing at the close of the period during which interest is payable out of capital by the

Branch Railway Company, by way of guarantee such a sum as shall, together with the net receipts of the said Railway for the said year to be retained by the Secretary of State, make up an amount equal to interest for the year at the rate of 3½ per cent. per annum on the share capital of the Branch Railway Company for the time being paid up. When the net receipts of the Branch Railway Company are less than the amount required to pay interest at the rate of 5 per cent. per annum on the said paid up share capital, the Secretary of State shall also be entitled to retain out of the amount to be paid to the company under Clause 23, the sum of Rs. 3,500 per annum and such other actual expenses as specified in Clause 6 of Schedule II of the said contract of the day of between the Secretary of State and the Branch Railway Company towards the office expenses and the expenses of management and direction of the Branch Railway Company, and also such legal expenses as may be incurred by the last mentioned company and approved by the Secretary of State and as are debitable to revenue. Provided always that when the net receipts of the Branch Railway Company (as defined in the said contract of the day of between the Secretary of State and the Branch Railway Company) in any year shall without the assistance of a guarantee exceed the amount sufficient to pay interest at the rate of 5 per cent. per annum such excess, if less than Rs. 3,500 plus such other actual expenses and the amount of legal expenses as aforesaid, shall be applied towards the office expenses and the expenses of management and direction and legal expenses and the balance necessary in order to make up a sum of Rs. 3,500 and such other actual expenses on account of the office expenses and expenses of management and direction and the legal expenses as aforesaid shall be retained by the Secretary of State out of the amount to be paid to the company under Clause 23. Provided also that when the net receipts as aforesaid shall exceed the amount sufficient to pay interest at the rate of 5 per cent. per annum and office expenses and the expenses of management and direction up to a sum of Rs. 3,500 and such other actual expenses and legal expenses as aforesaid, a moiety of such excess shall belong to the Branch Railway Company and be retained by the Secretary of State and the remaining moiety shall belong to the Assam Bengal Railway and be paid to the company to be credited to the revenue of Assam Bengal Railway undertaking. The payments under this clause shall be calculated at the close of each year, but payments on account and subject to adjustments may be made, at the close of the first half of each year."

I may perhaps explain at this stage that this light railway is worked and managed by the Assam Bengal Railway Company on behalf of the Secretary of State.

9. As required by Section 66 of the Act I respectfully state my own view on the questions at issue.

10. With regard to question (2) the assessee company assumes that its share capital is merely "capital borrowed" for the purpose of its business. There is however no foundation for this assumption and no capital has been borrowed by the company. Its capital is the money subscribed by its shareholders and its share capital pure and simple within the accepted meaning of that expression in the Companies Act. This capital does not change its character and become "capital borrowed" merely because the subscriber (shareholders) are entitled to get what is called in the agreement between the company and the Secretary of State "guaranteed interest". What is thus described as "guaranteed interest" is merely and in reality the dividend on share issued by the company in the open market and subscribed by shareholders. In my opinion, therefore, Section 10 (2) (iii) of the Income Tax Act has no application in the circumstances of the case and further the payment of this so-called guaranteed interest is not completely independent of the earning of profits and in this view also the section can have no application.

11. With regard to the first question, I do not see why the subsidy should not be treated as the income of the assessee. By arrangement between the company and the Secretary of State there has, as it were, been guaranteed to the company, a minimum profit, the subsidy being only a contribution towards this minimum. The receipts of the company from whatever source derived will be its income and will be so, though the sum may be wholly or in part distributed as dividends subsequently.

11 (*a*). With regard to question 3, I cannot accept the view that even the profits earned by the company independent of the State subsidy are not taxable because they constitute payments to the company by the Secretary of State. They are not such payments at all. Under the terms of agreement between the company and the Secretary of State they are the company's profits and even though they must be disposed of in a certain manner that does not make them the company's profits any the less.

12. It has been argued that the assessee's case finds support from the decision of their Lordships in the case of *Bengal Nagpur Railway Co., Ltd.* v. *Secretary of State for India in Council* (49 Cal. 815), but even after careful examination of the decision in that case I fail to see how it helps the assessee. There the question at issue was whether certain interest payable to the Secretary of State by the Railway Company was or was not an admissible deduction from the Railway Company's profits. The Secretary of State was the owner of the Railway and the Bengal Nagpur Railway the Managing Company. An attempt was made in that case to assess the latter on all the earnings of the railway but it was pointed out by the Hon'ble Court that this would have been justifiable only if the company owned the railway. All the earnings belong to the owner and the income of the manager is only what he gets as his property. In that case WOODROFFE, J., observed

that the principle applicable is that the company should pay a tax on what it gets and he decided the case against the Crown because this interest was deductible before the profits in which the company was entitled to share could be ascertained. In the present case, the assessee company or its shareholders are the owners of the railway and what the Secretary of State has done is to guarantee a minimum rate of return on shares.

13. In Miscellaneous Judicial Case No. 157 of 1932 decided by the Patna High Court on the 29th November, 1933, in the case of *Commissioner of Income Tax* v. *Manager, Katras Encumbered Estate*, their Lordships in referring to the judgment of the Privy Council in the case of *Raja Bejoy Singh Dudhuria* v. *Commissioner of Income Tax, Bengal* (6 I. T. C. 449) noted that it was specifically stated in the judgment of their Lordships in the Privy Council that it was not a case of the application by the assessee of part of his income in a particular way, but it was a case of the allocation of a sum out of the revenue before it became the income of the assessee and that was why it was an admissible deduction from the assessee's profits in that case. In the present case, in my respectful opinion both the net working profits of the company and the subsidiary receipt from the Secretary of State are taxable as income of the company and they are not exempt from taxation because under the terms of agreement with the Secretary of State they must be applied in a particular manner.

14. In *Madras and South Mahratta Railway* v. *Commissioners of Inland Revenue* (5 A.T.C. 739) it was held that the interest guaranteed by the Government of India to the company was a distribution of profits earned and *a fortiori* the subsidy paid by the Secretary of State in this case to make up the guaranteed minimum rate of dividends is to be considered the profits of the company.

15. In my view, therefore, the assessment as made by the Income Tax Officer and as set out in paragraph 2 of this statement of case has been correctly made."

Pugh, for the assessees.

The Advocate-General and *Dr. Radha Binod Pal*, for the Commissioners.

JUDGMENT.

DERBYSHIRE, C. J.:—This matter comes to us by way of reference from the Commissioner of Income Tax, Bengal, under Section 66 (2) of the Indian Income Tax Act (XI of 1922) and it is in the matter of the Ahmadpur Katwa Railway Co., Ltd., and the Katakhal Lalabazar Railway Co., Ltd. An assessment was made upon these companies for income tax for the year 1933-34 and Messrs. McLeod & Co., who are the Managing Agents of five Light Railways, the Ahmadpur Katwa Railway Co., Ltd., the Katakhal Lalabazar Railway Co., Ltd., the Bankura Damodar

River Railway Co., Ltd., the Kalighat Falta Railway Co., Ltd., and the Burdwan-Katwa Railway Co., Ltd., have asked for a case to be stated under the abovementioned section. The appeals in all the five cases were heard together and one joint order was passed. By common consent of the parties two railways were taken as typical of the five:—The Ahmadpur Katwa Railway Co., Ltd., and the Katakhal Lalabazar Co., Ltd.

In the reference it is set out that these two railways were originally constructed with the capital found under the following Agreements:—in the case of the Ahmadpur Katwa Railway Co., Ltd., an agreement of the 8th May, 1922 between the Secretary of State for India in Council and the Ahmadpur Katwa Railway Co., Ltd., providing for the Railway Company finding a certain sum of money and handing that money over to the State and the State thereafter was to construct and operate the Railway. In the agreement the following provision occurs with regard to the liability that the State assumed in respect of moneys payable to the Railway Company under the contract. I am now quoting from Schedule II, Clause 3 of the Agreement:—

"The net earnings of the said Railway as defined in Clause I of this contract together with receipts on account of transfer fees, if any, and such interest as may accrue during the half-year from investment or deposit in banks and any profits realised on the sale of any such investments referred to in Clause 30 of the above-written indenture less such sum as may be payable by way of interest on debentures, if any, shall constitute the net receipts of the company for the said half-year and shall be applied by the Secretary of State in manner and subject as hereinafter appearing.

If in any year during the continuance of this contract commencing from the first half-year after the close of the period during which interest is payable out of capital under Clause 4 of this schedule whether interest under the said Clause is paid or not:—

(i) the net receipts of the company shall exceed the minimum amount sufficient to pay interest on the paid-up share capital of the company at the rate of 5 per cent. per annum such excess shall be divided equally and one moiety thereof shall be retained by and belong to the Secretary of State and the other moiety shall be paid to the company:

(ii) the net receipts of the company do not amount to a sum sufficient to pay interest as aforesaid at the rate of 5 per cent. per annum the whole of such net receipts shall belong to and be paid to the company;" and

(iii) and this is the crucial Clause—"the net receipts of the company shall not be sufficient to pay interest on the paid up capital of the company at the rate of 3½ per cent. per annum the Secretary of State will pay to the company in addition to the net receipts of the company for such year such a sum as shall with the said net receipts make up an amount equal to interest for such year at the rate of 3½ per cent. per annum on the

share capital of the company for the time being paid up provided always that the Secretary of State shall be at liberty to apply any moneys payable to the company under this clause to any of the purposes for which the company are under this contract bound to provide the funds, in case there shall be no capital money in the Government Treasury at the time available and also to deduct from any such moneys all moneys (if any) which shall for the time being be owing to the Secretary of State by the company under this contract and which the company ought to have paid, but shall have failed to pay into any Government Treasury in India. All moneys so retained and applied or deducted shall be afterwards recouped to the company out of capital as soon as the same shall have been paid into Government Treasury".

In the case of the second company, the Katakhal Lalabazar Railway Co., Ltd., the general provisions are, as far as they are material, substantially the same. There is this clause in Schedule II, Clause 4, headed, Guarantee.

4. The net earnings of the said railway as defined in Clause 3 of this schedule together with receipt on account of transfer fees, if any, any such interest as may accrue during the half-year on the un-expended capital of the capital of the company referred to in Clause 22 of the scheduled contract less such sum, as may be payable by way of interest on debentures, if any, shall constitute the net receipts of the company for the said half-year and shall be applied by the Secretary of State in manner and subject as hereinafter appearing :—

(*a*) When the net receipts of the company in any year shall exceed the minimum amount sufficient to pay interest on the paid up share capital of the company at the rate of 5 per cent. per annum such excess shall be applied towards the payment of office expenses and the expenses of management and direction of the company up to the limit provided for in Clause 6 of this Schedule and the balance, if any, shall be divided equally and one moiety thereof shall be retained by and belong to the Secretary of State and the other moiety shall be paid to the company.

(*b*) When the net receipts of the company for any year do not amount to a sum sufficient to pay interest as aforesaid at the rate of 5 per cent. per annum the whole of such net receipts shall belong to and be paid to the company.

(*c*) If in any year during the continuance of this Contract commencing from the first half-year after the close of the period during which interest is payable out of capital under Clause 5 of this schedule whether interest under the said clause is paid or not the net receipts of the company shall not be sufficient to pay interest on the paid-up share capital of the company at the rate of $3\frac{1}{2}$ per cent. per annum the Secretary of State will pay to the company in addition to the net receipts of the company for such

year such a sum as shall with the said net receipt make up an amount equal to interest for such year at the rate of 3½ per cent. per annum on the share capital of the company for the time being paid-up:

Provided always that the Secretary of State shall be at liberty to apply any moneys payable to the company under this clause to any of the purposes for which the company are under this Contract bound to provide the funds, in case there shall be no capital money in the Government Treasury at the time available, and also to deduct from any such moneys all moneys (if any) which shall for the time being be owing to the Secretary of State by the company under this contract and which the company ought to have paid, but shall have failed to pay into any Government Treasury in India. All moneys so retained and applied or deducted shall be afterwards recouped to the company out of capital as soon as the same shall have been paid into the Government Treasury.

Then follows this clause:—

(*d*) If in any year during the ten years commencing from the first half-year mentioned in the foregoing Clause 4 (*c*) the net receipts of the company shall not be sufficient to pay interest on the paid-up share capital of the company at the rate of 4½ per cent. per annum the Secretary of State will pay to the company in addition to the sum if any, paid by him under the aforesaid clause a further sum out of the revenues of the Assam Administration which shall with the said net receipts and the said sums paid by the Secretary of State under the aforesaid clause make up an amount equal to interest for such year at the rate of 4½ per cent. per annum on the share capital of the company for the time being paid-up."

I ought to have said that was an Agreement made on the 19th of May, 1923 between the Secretary of State for India in Council and the Katakhal Lalabazar Railway Co., Ltd.

The companies made an issue of shares to the public and in the Prospectus, a portion of which is set out in the Paper Book, it is stated that the concessions granted to the company by the Secretary of State for India are as follows:—

"(1) The Secretary of State will guarantee interest at the rate of 3½ per cent. per annum on the share capital of the company for the time being paid-up, after the close of the period during which interest in payable out of capital;

(2) The payment of interest out of capital during construction at a rate not exceeding 4 per cent. per annum on capital as paid up.

As a result of the issue of shares consequent upon that prospectus the capital moneys of the companies were paid up and transferred in accordance with the agreement to the Indian Treasury of the Secretary of State.

During the income tax year 1933-34 the two typical companies made profits and received subsidies from the Government as follows:—The Ahmadpur Katwa Railway Co., Ltd., had adjusted profits as per account exclusive of the State subsidy of Rs. 5,277-8-6; the State subsidy was received by the company amounting to Rs. 55,062-7-6; so that the total sum received into the coffers of the company and available for dividend before any deduction for tax was made was Rs. 60,340. For the same year the Katakhal Lalabazar Railway Co., Ltd., had an adjusted loss as per account excluding the State subsidy of Rs. 6,436-13-3; it received a State subsidy of Rs. 46,536-5-3 and its total income available for payment of dividend before income tax was deducted was Rs. 40,099. The State subsidies so paid were according to Government in accordance with the terms of the agreement which had reference to subsidies.

Then the following position arose: the income tax authorities purported to assess the companies to income tax under the Income Tax Act upon not only the earnings of the company in the case of the Ahmadpur Katwa Railway Co., Ltd., but also upon the State subsidy received. Also in the case of the Katakhal Lalabazar Railway Co., Ltd., they purported to assess the Railway Company upon the total State subsidy which was received after deducting the losses. The Railway Companies thereupon contended that they were not assessable in respect of those State subsidies, contending that those State subsidies were, in effect, payments made by the State under its contracts with the several companies made for the purpose of distributing interest or dividend to the shareholders at the rate of 3½ per cent. The companies contended that if income-tax were deducted in the way that had been claimed by the revenue authorities it would be something that was contrary to the Income Tax Act and contrary to the contracts between the parties.

As regards the moneys paid as subsidy by the Government to the companies, are those moneys assessable as income? "Income" is not specifically defined in the Income Tax Act. The word "income", is used along with two other words "profits" or "gains" and it may be that those words are explanatory of the word "income". On the whole, I take the view that the word "Income" in this particular case means moneys which are in the coffers of the company and are available in the same way as earnings for the purpose of payment out as interest or dividend. In my view, the subsidy is in lieu of moneys which might have been earned by the company and has the same nature as moneys which were earned by the company as far as liability to income tax is concerned. In that it seems to me I am supported by a decision which was given by the Court in England under a contract which in essential particulars or in relevant particulars was the same as this. That is the case of *Nizam's Guaranteed State Railway Co.* v. *Wyatt* which is reported in *Tax Cases* Vol. 2,

p. 584. In that case the company constructed a Railway in Hyderabad. The Nizam's Government guaranteed an annuity for 26 years of 5 per cent. on the issued share and debenture capital. The purpose of that anunity was to be applied in paying interest on such capital and in forming a sinking fund for the redemption of the debentures; subject to provisions for repayment of the sums paid with interest, out of profits earned, and in that case the Court of Appeal in England held that the whole annuity including the sums applied to sinking fund was chargeable with duty. The relevant clause in the agreement between the Government of Nizam and the company is set out at page 585 of the report and it is Article 25. The account of the extract reads as follows:— "By Article 25 of the said agreement the Government of His Highness the Nizam agreed for the period of 20 years to pay the appellant company an annuity equal to £ 5 per cent. per annum on the issued capital of the appellant company, both share and debenture not exceeding £ 4,500,000, the appellant company being bound to apply the same in payment of interest at 5 per cent. per annum on the paid-up share capital in payment of the debenture interest at 4 per cent. and in providing a sinking fund for the reduction or redemption of capital as in the said agreement and in the next paragraph hereof is mentioned." The provisions for a sinking fund are not, in my view, relevant to this case. It was contended that that annuity was not chargeable with duty. The Court of Appeal held that it was; and I think the substance of the Court of Appeal's decision is given in the judgment of BARON POLLOCK at page 590 in the following words:

"It seems to have been almost *idem* per *idem* with what took place in the case which Mr. Kennedy handed up to us yesterday of *Blake* v. *The Imperial Brazilian Railway Company*, and for my part I entirely endorse what was said by by brother Day in that case that this money is in every sense of the term income. It is true it is not spent as Mr. Justice Day said, by the company themselves or divided amongst their shareholders simply as interest or otherwise. When once the thing is ascertained as being subject to income-tax it matters not what is done with it afterwards. When once it has come within the grasp of the Income Tax Acts, it is liable to income-tax whatever may be its destination or whatever use it may be put to."

In my view that passage from the judgment that I have cited governs the decision in this case. Here, in the case of the Ahmadpur Katwa Railway Co., Ltd., it was provided that "if the net receipts of the company shall not be sufficient to pay interest on the paid up share capital of the company at the rate of 3½ per cent. per annum, the Secretary of State will pay to the company in addition to the net receipts of the company for such year such a sum as shall with the said net receipts make up an amount equal to interest for such year at the rate of 3½ per cent. per annum on the share capital of the company." What had to

be paid over by the State was an arithmetical sum of money fixed definitely by the provisions of Schedule II, Clause 4, sub-paragraph (c). Once that money was paid, in my view, it was 'income' and as such came within the grasp of the income-tax and was liable to income-tax in spite of the fact that it was intended to be paid automatically to the shareholders.

Similar provision applies in the other case and a similar result follows.

Answering the questions that have been put to us in the reference : on the first question put to us in the reference "whether on a proper construction of the terms of the Agreement between the company and the Secretary of State for India in Council the subsidy paid by the latter is the "Income" of the "former" the answer is in the affirmative.

On the second question, "Whether the 'guaranteed interest' payable to the shareholders is deductible under Section 10 (2) (iii) of the Income Tax Act it was not seriously contended by Mr. Pugh that the answer would be otherwise than in the negative. The answer is clearly that the "guaranteed interest" payable to the shareholders is not deductible under Section 10 (2) (iii) of the Income Tax Act.

The third question was "whether the profits earned by the company independent of the State subsidy are, in the circumstances of the case, taxable or not as the company's profits". As regards this question too Mr. Pugh did not seriously contend that the company's profits earned independently of State subsidy were not taxable. The answer is clearly, in my view, in the affirmative.

It has been contended by Mr. Pugh that hardship falls upon the shareholders in this case who have subscribed their money for shares in these companies under the impression created by the Prospectus that they would be entitled to 3½ per cent. Whereas, in fact, they got less by reason of a deduction for income tax. That may be a hardship or it may not, according to the income of the shareholders and according to the amount of tax thas is being deducted. Mr. Pugh further contends that there was a very real hardship in these cases because the Revenue authorities had begun to assess the companies for super-tax and that diminished the amount of money that was available for distribution to the shareholders over and above what was deducted for income-tax. As far as one can see that is a hardship upon the shareholders which the ordinary shareholders could scarcely be expected to realise or contemplate when they subscribed their money for the shares.

There is a power in Section 60 of the Income Tax Act which reads as follows :—The Governor-General in Council may, by notification in the Gazette of India, make an exemption,

reduction in rate or other modification, in respect of income tax in favour of any class of income, or in regard to the whole or any part of the income of any class of persons."

It may be, I don't know, it is not for me to say, but it may be, that relief can be given to the share holders in respect of an unexpected impost of taxation under that particular section.

The assessees must pay to the Commissioner of Income tax the fees actually paid to his counsel *plus* a sum of seven gold mohurs as costs of this reference.

COSTELLO, J.—When this matter was before the Commissioner of Income Tax it was argued that the State subsidy was not taxable in the hands of the company because it was paid by the Secretary of State for India under the terms of the agreement between the company and the Secretary of State in order to make up the minimum guaranteed interest payable to the share holders and because that was the position, the company was merely a trustee on behalf of the share holders and accordingly the guaranteed interest, when received by the share holders, constituted income taxable in their hands, but not the income of the company. A similar argument was put before us by Mr. Pugh. He sought to induce us to accept his contention that the company was no more than "a conduit pipe" between the Secretary of State for India and the share holders of these companies. In that connection Mr. Pugh relied upon the case of *In re South Llanharran Colliery Company, Ex Parte Jegon* (12 Chancery Division, page 533). In that case Mr. Jegon had contracted with a trustee for an intended company to sell to the company a coal mine and works for £35,000 of which £10,000 was to be paid in money and the remainder in paid-up shares of the company. He agreed to pay the company during the first two years of its incorporation such a sum as together with the net profits of the company would be equal to interest at 5 per cent. on the paid-up capital; such money to be repaid to him in a certain event. The company was formed, and the contract was recited and adopted in the Articles of Association. The profits not being sufficient to pay 5 per cent., Jegon paid a sum of money to the Directors for distribution among the share holders to make up the deficiency in pursuance of his contract. After the last payment became due, but before it was paid, the company was wound up voluntarily, and Jegon paid to the share holders the amount necessary to bring the last dividend up to £5 per cent. The liquidator claimed the money as part of the assets of the company but it was held that the money due from Jegon under this guarantee was properly payable to the share holders, and was not part of the assets of the company. It is to be borne in mind that this case arose in connection with the winding up of the company in question and it would appear that the money finally paid by Jegon was definitely ear-marked for the purpose of payment to the share holders direct. In my opinion, therefore, it is not surprising in

the circmstances that it was held that the money provided by Jegon was no part of the assets of the company. The decision in this case, I think, is no authority at all in the circumstances for the proposition advanced by Mr. Pugh because there is nothing to indicate that had the question arisen during the life-time of the company as to whether or not the moneys paid by Jegon to the company for the purpose of providing dividends to the shareholders were taxable, it would not have been held that the moneys provided by Jegon were part of the assets of the company for the purposes of the Income Tax Acts.

In my opinion, it is quite clear that the moneys provided by the Secretary of State in the present instance should properly be described and treated as "income" of the company. I agree with what my Lord the Chief Justice has said upon this point and I think that the matter is covered and indeed is concluded by the two cases reported in *2 Tax Cases*, namely, *Blake* v. *Imperial Brazilian Railway* at page 58 and *Nizam's Guaranteed State Railway Co.* v. *Wyatt* at page 584. To those two authorities I would add one more, a case which, in my opinion, is directly in point in connection with the question which we now have to decide. It is the case of *Pretoria Petersburg Railway Company Limited* v. *Elgood* [98 Law Times Reports, page 741]. The head note of that case is as follows:—"On the 2nd November, 1895, the South African Republic granted H.J.S. a concession for the construction of a Railway and the South African Republic guaranteed to a company which was formed to take over the Railway interest at 4 per cent. on its share capital. On the 11th October, 1899, war having broken out, the line was seized and worked by the British military authorities until the end of the War. On the 18th February, 1902, the British Government gave notice to expropriate the Railway under the terms of the concession. They recognised the validity of the concession and admitted liability to pay all arrears of interest. They paid £97,506 16s. 11d. as guaranteed interest on share capital at 4 per cent. per annum from the 1st January, 1899 to the 14th November, 1903 "in addition to the other payments on the expropriation", and it was held by the Court of Appeal (the judgment being given by Lord Justice FLETCHER MOULTON), "That the sum of £97,506 16s. 11d. was not part of a sum paid by the British Government as the gross revenue of the company earned as a trading company from the 1st January, 1901, to the 14th November, 1903, and that after deducting certain expenses incurred by the company during the same period, the benefit of the three years' average must be applied and income tax was payable on one-third of the balance only". The importance of this case is that it shows that the amount paid by the British Government in order to make up for the loss of the subsidy which but for the war the South African Republic would have paid to the Railway Campany was in the

nature of "income" received by the Railway Company and was, therefore, properly chargeable to income tax.

The other two points raised in the case put before the Court by the Commissioner of Income Tax were not seriously argued by Mr. Pugh and it is not necessary that anything should be said with regard to them.

I agree that the first question must be answered in the affirmative.

Reference answered accordingly.

[IN THE CALCUTTA HIGH COURT.]

JAWALA PRASAD CHOBEY
v.
COMMISSIONER OF INCOME TAX, BENGAL.

Sir Harold Derbyshire, C.J., and Costello, J.

March 12, 1935.

RE-ASSESSMENT—NOTICE UNDER SECTION 34, REQUISITES OF—RIGHT OF ASSESSEE TO SHOW THAT INCOME WAS ASSESSED UNDER ANOTHER HEAD—REFERENCE—INCONSISTENT POSITIONS—ESTOPPEL—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 34.

A notice under Section 34 of the Indian Income Tax Act is not to be in any prescribed or statutory form, and therefore, so long as it brings to the attention of the persons to whom it is served the matters required to be answered or dealt with or the things required to be furnished it is sufficient.

If a notice is served under Section 34 of the Indian Income Tax Act saying that income had wholly or partially escaped assessment it is only right and proper that the assessee should be entitled to show, if he can, that the income which is said to have escaped assessment was in fact included in any sum stated in the return, even though that sum was stated under some other head. But the question whether that income was included in another head or not is purely a question of fact and if the income tax authorities find that it has not been so included, there is no question of law which the Commissioner can be directed to refer.

Where an assessee expressly declared that he had no income from dividends and deliberately withheld information from the income tax authorities and intentionally refused to produce his accounts: Held, *in proceedings under Section 34 in respect of assessment of income from dividends, that, on principles analogous to the principle of estoppel the assessee could not be heard to say that the sum assessable as dividends was in any sense included or taken into account in the sum assessable as profits of business.*

Cases referred to:

T. S. T. S. CHETTIAR FIRM v. COMMISSIONER OF INCOME TAX [1931] (5 I.T.C. 194; A.I.R. 1931 Mad. 333.)

Satyendra Mohan Roy Choudhury v. Commissioner of Income Tax, Bengal [1930] (I. L. R. 58 Cal. 326; 34 C. W. N. 816; 4 I. T. C. 447; 129 I. C. 405; A. I. R. 1930 Cal. 627).

Biswas, for the Assessee.

Dr. Radha Binode Pal, for the Commissioner.

Costello, J.—On the 5th of December, 1934, a Rule was issued by Mr. Justice Lort-Williams and Mr. Justice Jack in the matter of an application under Section 66 (3) of the Indian Income-Tax Act, 1922 at the instance of Jawala Prasad Chobey calling upon the Commissioner of Income-Tax, Bengal, to show cause why he should not draw up a statement of the case mentioned in the petition on which the application was based and refer the statement of the case to this Court under Section 66 (3) of the Indian Income Tax Act for its opinion on the questions of law referred to in the order made by this Court. Those questions of law were stated under three heads after the original questions given in the petition had been redrafted by Counsel on behalf of the petitioner at the suggestion of the Court. In their final shape the questions were as follows: (i) Whether, having regard to the fact that Section 34 of the Act requires "particulars" to be stated in the notice and that the notice is the basis of the proceedings under the said section, the Income Tax Officer was competent in law to go behind the particulars as specified in the notice under Section 34 in the present case? (ii) Whether in view of the fact that admittedly the previous assessment did not give the details of the estimate on which the assessment was made, and in view of the nature of the business carried on by the assessee, the Income Tax Officer was entitled to assume that income from dividends had not and could not have been included in the previous assessment? or, was it not open to the assessee to rebut the said assumption by reference to his books of account and other evidence and claim to reopen the said previous assessment accordingly? (iii) Whether or not in the circumstances of the case, the Income Tax Officer was justified in law in holding that he was precluded from entering into the merits of the former assessment?" The Commissioner of Income Tax was required to show cause why he should not state a case raising those three questions for the opinion of this Court.

In the proceedings now before us the Commissioner of Income Tax, Bengal, is showing cause why he should not be required to state a case. He has submitted a somewhat comprehensive statement to this Court and in paragraph 4 he says "I presume I am required to show cause only in respect of the questions as formulated by the leave of the Court and in this connection I would respectfully urge that the first of the 3 questions thus formulated was never raised, at the stage when the matter was before the Assistant Commissioner or Commissioner. The second question also would appear to be new except for the last portion thereof which corresponds to some extent to question (*D*) of the applicant's list, while question No. III would also appear to be new in form and in substance."

In order to appreciate how the questions which were formulated on behalf of the petitioner can in any way be material it is necessary that I should recapitulate the history of this matter. The petitioner originally submitted a return of his income under the provisions of Section 22 (2) of the Income Tax Act on the 3rd of June, 1929 and in that return he showed his income under the heading "Business, trade, commerce, manufacture, or dealing in property, shares or securities" that is to say, heading 5 as being the sum of Rs. 9,412-10-0, that is to say, he gave that figure as the amount of profits or gains or income during the previous year under the heading of "business". A week or two later, that is to say, on the 27th of June, 1929, the present petitioner submitted a revised return as he was entitled to do under the provisions of Section 22 (3) and in that revised return the statements in the column heading "amount of profits or gains or income during the previous year" were amended. Under heading 1 "Salaries" he put the word "nil"; under heading 1-B "the interest accruing to the account mentioned in 1-A which is not exempt for income tax" ditto; under heading 3 "Interest on Securities of the Government of India or of local Government declared to be income-tax free"—ditto; under heading 5 "Business" he stated the amount to be 11,752; under heading 6 "Profession" he put the word "nil" under heading 7 "Dividends from companies" ditto; and under heading 8 "Interest on mortgages, loans, fixed deposits, current accounts etc." ditto; the total being stated to be 11,752. It has thus to be seen that in the revised return which was made on the 27th of June, 1929, the assessee had put the return in such a form as would indicate that he had given close attention to the various headings under which he might be chargeable to income tax. The importance of this return is that against heading 7 "Dividends" he had put "nil". The Income Tax Officer was then of opinion that even this second return did not properly or fully disclose the whole of the taxable income of the assessee and accordingly the Income Tax Officer served a notice upon the assessee under the provisions of Sections 22 (4) and 23 (2) calling upon him to furnish such evidence as was available to substantiate the return which he had made and also calling upon to produce accounts and other documents in support of it. In pursuance of that notice the assessee did produce certain accounts in the form of a "daily purchases and sales book" sowda book, and as a result of the enquiry that ensued, on the 10th of December, 1929, an assessment was made under the provisions of Section 23 (3) of the Act which provides that "the Income Tax Officer after hearing such evidence as such person, i. e., the assessee, may produce and such other evidence as the Income Tax Officer may require on specified points shall, by an order in writing, assess the total income of the assessee and determine the sum payable by him on the basis of such assessment."

The assessment made on the 10th of December, 1929, was on the basis of a total income of Rs. 38,000 of which Rs. 28,000 was in

respect of "business" and Rs. 10,000 in respect of "interest". Some months after it came to the knowledge of the income tax authorities that the assessee had a business in Agra and he had been assessed in Agra in respect of the business. Accordingly on the 21st of March, 1930, a notice was served under the provisions of Section 34 of the Income Tax Act which provides "If for any reason income, profits or gains chargeable to income tax has escaped assessment in any year, or has been assessed at too low a rate, the Income Tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-Section (2) of Section 22, and may proceed to assess or reassess such income profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section." That means of course that where a notice is served under Section 34 the Income Tax Officer may again require a production of accounts or other evidence bearing on either of the two points on which the notice may be, that is to say, the income which has escaped assessment or the income on which tax has been charged at too low a rate. This notice of the 21st of March was directed to the second part of Section 34 and was intended to enable the income tax authorities to amalgamate the original assessment on the Calcutta business Rs. 38,000 with the assessment on the Agra business which was to the amount of Rs. 12,000. At that time no question had arisen as to the escape of any income from assessment and, therefore, the Income Tax Officer at that time did not require a production of any further account or documents or other evidence. As a result of the issue of that notice a return was submitted on the 25th of April, 1930, again duly signed by the assessee in which he stated that the income of the Calcutta business was Rs. 38,000 and the income of the Agra business Rs. 12,000 making a total of Rs. 50,000. A month later, on the 21st of May, 1930, an assessment was duly made upon the basis of that return with the addition of a sum of Rs. 100 on account of certain house property owned by the assessee in Agra whereby the total income was brought up to a sum of Rs. 50,100. The assessment was in these terms. "In this case notice under Section 22 (2) read with Section 34 was issued as per orders dated 20th March, 1930. The assessees filed a duly verified return on 23rd April, 1930. They have failed to comply with the terms of the notice under Section 23 (2). It has been alleged that no accounts are kept by them. This is unthinkable. A business firm like theirs cannot do without accounts and I am of opinion that the books are being intentionally withheld. They are thus liable for assessment under Section 23 (4). I assess them accordingly under Section 23 (4) for 1929-30 read with Section 34 on a total income of Rs. 60,100. Income tax now due Rs. 1,156-4-0." *

After that there was an interval of some five months and on the 9th of October, 1930 a second notice under the provisions of Section 34 was served on the assessee and in that notice it was averred that "income from dividends etc., has partially escaped assessment." So, that was a notice under the first part of the provisions of Section 34. Pursuant to that notice a return was submitted in which it was stated that the assessee had no income from dividends apart from the income disclosed under the heading "business". That return is somewhat illuminating. It is dated the 27th of November, 1930, and in it the assessee once more revised the amount of his income under the heading of "business." I emphasize again that originally it was stated by him to be Rs. 9,000, it was then stated by him to be Rs. 11,000 odd; and it was ultimately assessed at Rs. 38,000. When the second notice under Section 34 was served and the return of the 27th of November, 1930, was made in consequence of that notice the assessee thought fit to reduce the assessable income under the heading "business" to the figure of Rs. 5,544 and he stated that the tax already charged on the income was Rs. 8,457-11-9. But the really significant part of this return is a sort of postscript added to the foot of the first page of the return in these terms: "The assessee has no income from dividends as contemplated in the notice under Section 34 distinct from his income from dealing shares. Income from dividends accrues to him as part of his business income and passes through the revenue account." One can only say—it seems somewhat curious, to say the least of it, that the first effect of the income-tax authorities saying that a part of the assessee's income had escaped assessment was for the assessee to contend that he had already been assessed at too high a figure under the heading "business". It is not surprising however that in those circumstances the income tax authorities were not content with that return; and on the 8th of May, 1931, fresh notices under Section 23 (2) and Section 22 (4) were issued calling upon the assessee to produce accounts for the year 1982-83, to 1984-85, *i.e.*, corresponding to 1925-26 to 1927-28. After receipt of those notices on the 18th of May, 1931, the assessee did produce certain books—khata books, rokurs, delivery book, Bank pass books, sowda books, share stock books, share security books and some others and the accounts disclosed in these documents were under examination by the income-tax authorities for a considerable period of time; and ultimately on the 28th of April, 1933, an assessment was made which is the assessment now called in question in these proceedings. The relevant part of the order of the 28th of April, 1933 is in these terms: I compute assessee's income as under:—

"Property at Agra	...	100
Business at Calcutta and Agra	...	50,000

There may or may not have been a loss as disclosed by the books, but I am precluded from entering into the merits of the former assessment made on Rs. 50,000 for business as I am of

opinion that no income from business escaped assessment." Then comes the heading "Dividends."

Net	...	Rs.	81,758 plus
3/29ths	...	Rs.	8,457
		Total Rs.	90,215

That added to 50,100 made a grand total Rs. 1,40,315. Then follows a calculation for super-tax.

Super-tax on Rs. 50,000 @ 0-1-0	...	Rs. 3,125
on Rs. 15,315 @ 0-1-6	...	Rs. 1,435-13-0
		Rs. 4,560-13-0

The order of the Income Tax Officer when that assessment was made contained a statement of his reasons for arriving at that assessment which is very material for our present purpose. He said this: "It is not likely that any dividend receipts are in the figure of Rs. 28,000 estimated after local enquiry, as, if dividend receipts were also to be shown they would necessarily have had to be shown under a separate head. In that case the use of the word "partial escape" in the notice under Section 34 has no meaning. It seems to me it is not a case whether the income partially or wholly escaped but if it escaped or not. Dividends have to be separately assessed and as this has not been done, they are liable for assessment now. Regarding the amount, pleader again urges that as the word "partial" was used, part of the dividend must have been assessed in the original assessment and that I should determine the portion escaped. This cannot be the case. If dividend income had been included in the original estimate, it could not have been taxed there again, as that in itself would have been tantamount to double taxation." Then he said—and this is of very great importance, "Having decided the above facts I compute assessee's income." Having made the assessment the Income Tax Officer then proceeded to discuss the question as to whether or not a penalty ought to be imposed under Section 28 of the Income Tax Act for deliberate concealment of the dividend income and in the course of the discussion on that point the Income Tax Officer said "It is certain, therefore that dividends were not shown in the original return and even in the return filed under Section 34, assessees showed Rs. 12,000, Agra income and 38,000 for Calcutta (which figure did not include dividends)."

Against the order of the Income Tax Officer which I have just quoted there was an appeal to the Assistant Commissioner of Income Tax and the Assistant Commissioner after reciting the history of the matter and calling attention to the note to which I have already referred, the note which appears on the return dated the 27th of November, 1930, said:—" The learned Advocate for the

appellant has urged that the Income Tax Officer is wrong in having assessed income from dividends only under Section 34 and that he should have determined all the sources of income for which he gave notice and that the Income Tax Officer assessed all the dividends but he should have assessed part of them only as in the notice under Section 34 it was said that dividends partially escaped assessment. It has also been urged that the income from business is intermixed with income from dividends and that the Income Tax Officer should have considered the business loss shown in the return last submitted." We have also been referred to the order dated the 26th of May, 1932, in which the Income Tax Officer said as follows:—

"No income excepting dividends appears to have escaped assessment. The proceedings under Section 34 will be disposed of afterwards."

From the above order of the Income Tax Officer the learned Advocate wants me to hold that the findings above have been arrived at after the Income Tax Officer had examined the accounts in respect of all the sources of income and that he should therefore have made the assessment of all the sources. It is also urged that having issued the notice saying "dividends etc.", the Income Tax Officer must have to assess all the sources other than dividends as well as dividends. Then comes this finding: From the recital of the facts above it will be clear that gradually things began to come to light. In this case from the solemn declaration of the assessee in the return dated 23rd April, 1930 it was found that they had business income of Rs. 50,000; 38,000 at Calcutta and 12,000 at Agra. The Income Tax Officer assessed only that income which escaped assessment which really is the scope of Section 34. Further, if as is claimed now, the income returned in the previous returns included dividend income, the assessees would certainly have objected to assessment to tax of that income if it really included dividend, for the same has been taxed at source already. On the admitted statement of the assessee the business income as distinct from dividends was a sum of Rs. 50,000/-. In the case of *T.S.T.S. Chettiar Firm* it has been held that it was not incumbent on the Income Tax Officer to reopen the assessment as a whole and to ascertain *de novo* the whole assessable income and that the Income Tax Officer was authorised and bound to assess only the income, profits or gains that had escaped assessment.

In the circumstances I think there is no reason to interfere with the assessment". So that the appeal from the assessment dated the 28th of February, 1933 was dismissed.

Thereupon the assessee moved the Commissioner of Income Tax to state a case to this Court. That the Commissioner of Income Tax declined to do and he gave reasons for his decision in his order dated the 15th February, 1934. In that order the history

of the case is once more set out and the Commissioner points out that after the return showing a profit of Rs. 11,752/- had been made, the assessee, when called upon to produce accounts simply produced his daily purchases and sales book and alleged that no other books were kept. In connection with the proceedings under Section 34 designed to bring in the amount of profits of the Agra business the Commissioner makes this comment: "In these proceedings the assessee submitted a return showing an income of Rs. 38,000 from Calcutta and Rs. 12,000 in Agra and when called upon to substantiate his return by evidence his representative, a lawyer, Babu H.L. Banerji, appeared and stated that no accounts were kept. The Income Tax Officer refused to believe this allegation and accordingly made an assessment under S. 23 (4) though on the figure of income returned by the assessee adding merely Rs. 100 as his value of his property in Agra. Later again it came to the notice of the Income Tax Officer that the assessee had a substantial income from dividends, the actual amount of dividends received in the year of account being Rs. 90,215, a sum which is not questioned by the assessee; I underline that last sentence and on receipt of information to this effect the Income Tax Officer issued another notice under S.34 calling for return of income and in compliance with that notice the assessee submitted a return showing profits of Rs. 5,544 under the head business and against that item a sum of Rs. 8,457-11-0 tax already charged. Then the Commissioner makes reference to the foot-note in the return dated the 27th of November, 1930, and with regard to it he says "The Income Tax Officer refused to accept this contention and on the ground that this income from dividends had escaped assessment, he again made an assessment under S.34 adding to the income originally assessed the sum of Rs. 90,215." Then he proceeds to discuss the contentions of the assessee and the reasons put forward why the Commissioner should state a case for the opinion of this Court. I need only refer to one passage which is in these terms: "I have already stated that in the first assessment of all, the assessee merely produced a sales book purporting to show his total transactions while in the course of his second assessment he alleged that he kept no accounts at all. In the third assessment, that is, the second under S. 34, he produced detailed accounts from which he claimed that his real profits of the year were Rs. 5,544, after passing the dividends through his general revenue account and treating them as receipts from business. How can I be asked to accept the position that because the assessee at this late stage produced certain accounts the existence of which he denied in the earlier assessments, the Income Tax Officer who made the earlier assessments must be presumed to have accepted the position reflected by those accounts." Then he refers to the 4 questions of law which the assessee desired to put forward for consideration of this Court. Nothing need be said with regard to the first three of those questions and with regard to the 4th the Commissioner accepts the assessee's contention with regard to the pure question of law. The question

was then put in this form: "Were not the assessees entitled in terms of the notice under Section 34 to show in any way they could that the income alleged to have partially escaped assessment has not in truth and in fact escaped assessment and for this purpose income, profits or gains have not necessarily escaped assessment because they had not been assessed under the right head?" That proposition of law is really accepted by the learned Commissioner. He says with regard to it "my answer to that question would be in the affirmative in accordance with the decision of the Calcutta High Court in the case of *Satyendra Mohun Roy Chowdhury & Others* v. *Commissioner of Income Tax, Bengal* (4 I. T. C. 447)". Then he adds this: "But that as a matter of fact the assessee in this case did not and could not show that the income which was alleged to have escaped assessment was in the previous assessment assessed by the Income Tax Officer under the head 'business'. The learned Commissioner accordingly records that "No reference will be made to the High Court and this application is disposed of accordingly."

The latter part of this order seems to be a finding of fact and Mr. Biswas was also disposed to agree that if that is so, then he cannot ask this Court to require the learned Commissioner to state a case. I mentioned at the outset the three questions which at the suggestion or with the assistance of the Court were finally put forward in the application for the Rule. Mr. Biswas has not seriously argued with regard to the first two of those questions. The first question deals with the form of notice. It is admitted that notice under Section 34 is not to be in any prescribed or any statutory form. Therefore, so long as it brings to the attention of the person to whom it is served the matters required to be answered or dealt with or the things required to be furnished it is sufficient. The second question as finally settled is very much the same as question 3, only in a different form. Put quite shortly, the whole matter resolves itself into this—whether in the circumstances it was incumbent on the Income Tax Officer to reopen not only the assessment which had been made after service of the first notice under Section 34, but even the assessment which had originally been made as a result of the return submitted by the assessee himself. I am of opinion that the view taken by the learned Commissioner of Income Tax as regards the question of law was correct. There is no doubt that if a notice is served under Section 34 saying that income has wholly or partially escaped assessment it is only right and proper that the assessee should be entitled to show, if he can, that the income which is said to have escaped assessment was in fact included in any sum stated in the return even though that sum was stated under some other head and in this particular instance if the matter had been *res integra*, if I may use the expression, no doubt when the second notice was served under Section 34 it would have been open to the assessee in the normal way to show that the dividends which were alleged to have escaped assessment had been in some form or other included

in the item put against the head "business". But one must consider the matter as a whole and in the light of the circumstances of the case. The question whether the dividends were included in the amount of Rs. 9,000, in the amount of Rs. 11,000 odd or in the amount of Rs. 38,000 odd or even in the amount of Rs. 5,544 is purely a question of fact and I am satisfied after a very careful scrutiny of what was stated by the Income Tax Officer in his order of the 28th April, 1933, that in effect he did come to a definite finding of fact that these dividends which amounted to no less than a sum of Rs. 90,215 had not been brought into account in arriving at the figure of Rs. 38,000; in other words, a sum which ought to have been stated as against heading 7 had not been given under heading 5 by inclusion in the sum said to be earned from business. I have already quoted a passage in the order of the Income Tax Officer of the 28th of April, 1933, which in my opinion makes that quite clear. That order as I have stated, was confirmed on appeal by the Assistant Commissioner of Income Tax after he had carefully considered the whole matter. The question was again considered by the Commissioner of Income Tax himself when an application was made to him to state a case to this Court and in my judgment the passage which I have already read, the passage which is in these terms: "The assessee in this case did not and could not show that the income which was alleged to have escaped assessment was in the previous assessment assessed by the Income Tax Officer under the head 'business' amounts to a clear finding of fact. In the course of the very lengthy investigation which took place after those various books which I have enumerated were produced, it must have been made clear that the sum chargeable under the head 'dividends' had not been included in the sum chargeable under the head 'business'. The reason given is that that examination and investigation into the accounts must have been sufficient to have disclosed these dividends, if in fact they were included in business and if the dividends had then come to light the result would have been that the assessee would have been required to amend his return so as to put the dividends under the proper head. As that has not been done it must be assumed that the investigation did not disclose the fact that the assessee had received this large sum of Rs. 90,215 as dividends on securities. In my judgment the findings of fact of the income tax authorities are such as would preclude the necessity for discussion of any point of law in this matter. On this point further it is quite clear that the assessee, first by implication and then expressly, declared that he had no income properly described or described at all as dividends. He made a categorical declaration to that effect and persisted in it.

Moreover, it is clear from the various facts to which I have alluded that there was from first to last a deliberate attempt on the part of this assessee to withhold information from the income tax authorities and an intentional failure on his part to produce proper accounts. Taking those facts together I am of opinion that on principles analogous to the principle of estoppel, this assessee

cannot now be heard to say that the sum assessable as dividends was in any sense included or taken into account in the sum assessable as profits of business.

In my opinion, therefore, this rule should be discharged. The applicant must pay the costs of the other side—such counsel's fees as he will have to pay to his counsel (we allow cost of two counsel) and a sum of seven gold mohurs for other expenses.

DERBYSHIRE, C. J.—I agree.

Rule discharged.

[IN THE PRIVY COUNCIL.]

COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA

v.

SIR KAMESHWAR SINGH.

Lord Macmillan, Sir John Wallis and Sir Shadi Lal.

July 2, 1935.

INCOME TAX—AGRICULTURAL INCOME—EXEMPTION—MONEY LENDING BUSINESS—ADVANCE OF MONEY ON USUFRUCTUARY MORTGAGE—RENTS RECEIVED BY MONEYLENDER, WHETHER EXEMPT—INDIAN INCOME TAX Act (XI OF 1922), SECTIONS 4 (3) (VIII), 6.

Agricultural income is altogether excluded from the scope of the Indian Income Tax Act, howsoever or by whomsoever it may be received. Such income does not, therefore, lose the benefit of the statutory exemption and become assessable as business profits merely because it is received by the assessee, not as an ordinary landlord or proprietor, but as a part of the income, profits or gains of a money-lending business carried on by him.

The assessee's father who carried on an extensive money-lending business made a loan of 18½ *lakhs of Rupees under an indenture described as* '*a* zarpeshgi *lease with usufructuary mortgage.*' *By this deed the lessor-mortgagor conveyed to the lessee mortgagee certain properties for a period of fifteen years. A certain portion of the rents was reserved to the mortgagor as* thika *rent and the mortgagee was allowed to take the balance of the profits after deducting the expenses as* thika *profits in consideration of the loan :*

Held, *affirming the decision of the Patna High Court, that the* thika *profits received by the assessee as mortgagee-lessee was exempt from income tax, being agricultural income.*

COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH [1934] (2 I. T. R. 107 ; A. I. R. 1934 Pat. 178) affirmed.

MUKAND SARUP *v.* COMMISSIONER OF INCOME TAX, U. P. (I.L.R. 50 All. 495 ; 107 I.C. 683 ; 2 I.T.C. 495) approved.

Appeal (P.C. Appeal No. 94 of 1934) from a judgment of the High Court of Patna. For a full report of the judgment appealed from see 1934, 2 I.T.R. 107.

A. M. Dunne, K. C., and *S. Strangman*, for the appellant.

A. M. Latter, K. C., K. P. Jayaswal and *J. Colombos*, for the respondent.

LORD MACMILLAN.—The present appeal arises from an assessment to income tax made upon the respondent for the year 1929-30 and the only question before their Lordships relates to an item of Rs. 91,283 included in the assessment. The appellant maintains that this item, the receipt of which is admitted, forms part of the taxable profits or gains of the business of money-lending carried on by the respondent; the respondent maintains, and the High Court has held, that it is " agricultural income " within the meaning of the Indian Income Tax Act and consequently exempt from income tax.

In order to determine which of these contentions is right, it is necessary to describe briefly the transaction out of which this item of receipt arose. It appears that in 1929 the respondent's father who carried on an extensive money lending business, made a loan of 18½ lacs of rupees, with the sanction of the High Court at Patna to Thakurain Kusum Kumari, widow and administratrix of the late proprietor of the estate of Lachmipur. The transaction was embodied in two indentures both dated February 3, 1929. The respondent's father died on July 3, 1929, and the respondent has succeeded him as his eldest son and heir and as his successor in business.

The first of the indentures is described as " *Zarpeshgi* lease with usufructuary mortgage " and is granted by Thakurain Kusum Kumari as " lessor mortgagor " in favour of the respondent's father as " lessee mortgagee " in consideration of the loan of 18½ lacs. The lessor mortgagor thereby grants, demises and conveys in *zarpeshgi* lease and by way of usufructuary mortgage certain lands in the District of Bhagalpur, forming part of the Lachmipur zamindari to the lessee mortgagee, to have and to hold the same for fifteen years. After stating that the lessor mortgagor has put the lessee mortgagee in possession, the indenture porceeds to state that the parties have agreed that the lessee mortgagee shall advance the sum of 18½ lacs and that for repayment of the loan, the lessor mortgagor has given, and the lessee mortgagee has taken the *zarpeshgi* lease and usufructuary mortgage. The rent reserved to the mortgagor lessor, and described as the "*thika* rent", is fixed at Rs. 31,000 arrived at by taking the gross average rental of the properties at Rs. 1,59,813 and then deducting management and other expenses amounting to Rs. 37,530, and "*thika* profits " Rs. 91,283, leaving Rs. 31,000. This sum of Rs. 91,283, designated "*thika* profits ", is the sum now

sought to be assessed. The identure further provided that the *thika* rent should form part of the yearly payments which the lessor mortgagor thereby undertook to make in reduction of the loan and should be increased as the amount of the loan diminished by 6 per cent. on the sums with a corresponding reduction in the " *thika* profits ". Other articles of the indenture provided that the lessee mortgagee should maintain the irrigation works, look after boundaries and collect all rents and income of every kind from the properties thereby leased and mortgaged and should peacefully hold and enjoy the same. The leased properties were mortgaged and hypothecated as security for payment of the *zarpeshgi* loan and the lessee mortgagee was given the right to hold over and retain possession of the properties until satisfaction of the entire debt.

The second indenture dealt with certain properties in the Sonthal Parganas also forming part of the Lachmipur estate, which could not legally be mortgaged. It is described as an indenture of lease and demised these properties to the respondent's father by way of lease for fifteen years at a *thika* rent of Rs. 30,000 the lessee being bound also to pay the Government revenue charges in respect of the properties comprised in both indentures. Part of the rent was appropriated to certain payments and the balance was to be credited by the lessee "towards the liquidation of the *zarpeshgi* loan and the usufructuary mortgage in respect of the properties in the District of Bagalpur in possession of the lessee " under the other indenture. The lessee was entitled peacefully to hold and enjoy the leased properties and to collect all rents, profits and income of every kind therefrom.

The legal position occupied by the respondent's father and now by the respondent in relation to the Lachmipur properties, as the result of the transaction embodied in the two indentures, is thus stated by the learned Chief Justice (Courtney-Terrell) :—

" The mortgagee lessee was to be in possession of both properties, and, in this relation to the cultivators of the soil he stood in the position of landlord dealing directly with them and collecting the rents. He had, moreover, to pay the Government revenue, cesses and taxes and his name was registered in the Land Registration Department. He alone was able to sue for rent whether current or arrears ; to sue for enhancement or for ejectment and was able to settle lands with raiyats and tenants in all the properties ; in fact he was in a position to take all proceedings which the mortgagor would have been able to take in the ordinary course if the lands leased and mortgaged had remained in her *khas* possession ".

It was not indeed disputed that the rents payable in respect of both properties were rents "derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such". The rents thus come within the

definition of "agricultural income" in Section 2 (1) (a) of the Income Tax Act and the "*thika* profits" or profit rental of Rs. 91,283, forming part of the rents, are therefore "agricultural income" within the statutory meaning. That being so, the respondent relies on Section 4 (3) of the Income Tax Act which in terms provides that "This Act shall not apply to the following classes of income.........(viii) agricultural income."

In answer to this *prima facie* conclusive ground for excluding the sum in question from the respondent's assessment the appellant concedes that if the respondent were not a money-lender and if the transaction in virtue of which he receives the rents had not been a transaction entered into in the course of his money-lending business, he would have been entitled to invoke the statutory exemption of agricultural income; but the appellant submits that the fact that the respondent carries on a money-lending business and receives the rents as the result of a transaction entered into in the course of that business makes all the difference. He refers to Section 4 (1) which prescribes that "this Act shall apply to all income, profits or gains as described or comprised in Section 6," which section in turn provides that "the following heads of income, profits and gains shall be chargeable to income tax......(iv) Business," and he contends that the item of income in question, while it may be "agricultural income" nevertheless have been received by the respondent not as an ordinary proprietor or landlord but as part of the income, profits and gains of his money-lending business, it loses the benefit of the statutory exemption of "agricultural income" and becomes assessable as business profits. This is the view which was taken by the Income Tax Officer and by the Assistant Commissioner. It was also the opinion expressed by the Commissioner in referring to the High Court, at the respondent's request, the two questions: "(*a*) Is the Lachmipur bond a simple mortgage or a usufructuary mortgage? (*b*) Is the income from the Lachmipur property taxable?"

Their Lordships find themselves in agreement with the learned judges of the High Court in rejecting the appellant's contention. Section 4 (1) in declaring that "this Act shall apply to all income, profits or gains as described or comprised in Section 6" is prefaced with the words "save as hereinafter provided" and thereinafter in the third sub-section it is expressly provided that "this Act shall not apply to......agricultural income." Similarly, Section 6 which includes "business" among the "heads of income, profits and gains chargeable to income tax" opens with the words "save as otherwise provided by this Act." The result, in their Lordships' opinion, is to exclude "agricultural income" altogether from the scope of the Act, howsoever or by whomsoever it may be received. As ASHWORTH, J., puts it in *Mukand Sarup* v. *Commissioner of Income Tax, United Provinces*—"The business of money-lending may bring in an income which is exempt from income tax on the ground that it is derived from agricultural land." The exemption is

conferred, and conferred indelibly on a particular kind of income and does not depend on the character of the recipient, contrasting thus with the exemption conferred by the same sub-section on the "income of local authorities."

There are no doubt cases where the question whether a particular item of receipt is taxable or not depends upon the nature of the receipient's business. Thus the profit made on the realisation of an investment is a taxable income receipt in the hands of an investment company which engages in the business of buying and selling investments but is a non-taxable capital receipt in the hands of an ordinary investor who is not engaged in that business. But in the case just put the question is whether the item is income at all; if it is income, it is plainly taxable. In the present case the item of receipt is admittedly income but it is income which the Act expressly excludes from taxation.

Their Lordships being of opinion that the High Court has rightly answered question (*b*) in the negative find it unnecessary as did also the High Court, to deal with question (*a*). The sum originally assessed appears to have been Rs. 97,283; this is an error and the figure which their Lordships find to be exempt from taxation is Rs. 91,283.

Their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed and the Judgment of the High Court affirmed. The respondent will have his costs of the appeal.

Appeal dismissed.

Solicitors.—Solicitor, India Office, for the appellant: Messrs. *Hy.S.L. Polak & Co.*, for the respondent.

[IN THE LAHORE HIGH COURT].

HIRANAND JAIRAM SINGH

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Sir James Addison, A.C.J., and Din Mohamed, J.

July 5, 1935.

ALLOWANCES—BUSINESS EXPENDITURE—SALT BUSINESS—SECURITIES DEPOSITED WITH GOVERNMENT FOR PURCHASE ON CREDIT—LOSS INCURRED IN SALE OF SECURITIES—WHETHER BUSINESS EXPENDITURE OR CAPITAL LOSS—INCOME TAX ACT (XI OF 1922), SECTION 10 (2) (ix).

The assessee who was a general produce dealer began to trade in salt in 1926. At that time salt purchased from Government could be paid for at once or payment could be postponed for six months if securities were deposited with the Commissioner of Salt. The assessee deposited certain Government securities. Later,

the system of deferring payment up to six monthe on security was abolished and the assessee had to sell the securities at a loss. Held, *on a reference by the Commissioner, that the loss incurred by the sale of the Government securities under these circumstances was a capital loss and was not allowable as a business expenditure incurred in the salt business.*

Case referred under Section 66 (2) of the Income Tax Act by the Commissioner of Income Tax, Punjab and N. W. F. P. [Mis. No. 18 of 1935].

Govind Ram Khanna for the assessees.

J. N. Aggarwal and *Sarb Mitar Sikri*, for the Commissioner.

JUDGMENT.—The question referred is " whether the loss incurred by the petitioning firm owing to the sale of the Government securities is a loss sustained in their salt business."

The assessee, who is a general produce dealer, began trading in salt in 1926. At that time salt purchased wholesale from the Government mines, could be paid for at once, or payment could be postponed up to six months if securities were deposited with the Commissioner of Salt. Later, the system of deferring payment up to six months, on adequate security begin given, was abolished and now salt can only be purchased against cash payments.

At the time of this change the assessee was in possession of certain securities which had been deposited in the manner described. He sold them and suffered a loss and claims that this loss was one sustained in the course of the salt business. The Commissioner of Income Tax is of opinion that it was not, and we are of the same opinion. In the first place it cannot be said that it was expenditure and in any case, the deficit was obviously one of a capital nature for which no allowance could be given. As pointed out by the Commissioner, if a man rents business premises, the rent is a revenue expense; but if he buys the premises and sells them at a loss, that is a separate capital adventure, for which no allowance is made. If he borrows capital, interest is proper charge. If he supplies the capital himself in some convertible from and on conversion there is a difference that is a separate capital charge, as it is not something he is " dealing in." A somewhat analogous case is reported as 10 Tax Cases 372. The buying of the securities was not compulsory as he could pay cash at once. His loss, therefore, in selling the securities was a capital item. It might be added that, if there had been a gain by sale, it would not have been included in the return or assessed.

For the reasons given we answer the question referred in the negative and allow the Commissioner his costs.

Question answered in the negative.

[IN THE MADRAS HIGH COURT.]

A. HARVEY

v.

COMMISSIONER OF INCOME TAX, MADRAS.

Sir H. O. C. Beasley, C.J., Cornish and Pandrang Row, JJ.

April 24, 1935.

INCOME TAX—COMPANY—ACCUMULATION OF PROFITS WITH INTENT TO PREVENT IMPOSITION OF TAX—ASSESSMENT OF SHAREHOLDERS—ESSENTIAL CONDITIONS—INTENTION TO PREVENT IMPOSITION—BURDEN OF PROOF—INFERENCE FROM CIRCUMSTANCES—DIFFERENCE BETWEEN ENGLISH AND INDIAN LAW—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 23-A (2).

Before an Income Tax Officer can assess the shareholders of a company under Section 23-A (2) of the Indian Income Tax Act on accumulated or undistributed profits of the company he has to be satisfied on two heads: Firstly *that the profits of the company have been allowed to accumulate beyond the existing and contingent needs of the company having regard to the maintenance and development of the company or that a reasonable part of the profits, having regard to the said needs, have not been distributed to its members.* Secondly, *he must be satisfied that such accumulation or failure to distribute was for the purpose of preventing the imposition of tax upon any of its members in respect of their shares in the profits so accumulated or not distributed. The purpose, however, must be a matter largely of inference from the facts of the case.*

Where a private company was formed in 1926 with the principal object of securing and holding shares in other companies and though there were large profits year after year they were not distributed till 1930 and the company failed to explain the large accumulation of profits: Held *that the income tax authorities were entitled to come to the conclusion that there was an intention to prevent the imposition of tax and to assess the shareholders under Section 23-A (2).* Held further, *that though there was no finding in express words that failure to distribute was for the purpose of preventing imposition of tax, as the Income Tax Officer had stated that the conditions of Section 23-A (2) had been fulfilled, and this decision was confirmed by the Board of Revenue, the assessment under Section 23-A (2) could not be held to be illegal for want of an express finding as to the intention of the assessee.*

Cases referred to :

COLVILLE ESTATE LTD. v. COMMISSIONERS OF INLAND REVENUE (15 TAX CAS. 485).

DAVID CARLAW & SONS, LTD. *v.* COMMISSIONERS OF INLAND REVENUE (11 TAX CAS. 98).

GLAZED KID, LTD. *v.* COMMISSIONERS OF INLAND REVENUE (15 TAX CAS. 445).

LONDON & NORTHERN ESTATES CO., LTD. *v.* COMMISSIONERS OF INLAND REVENUE (16 TAX CAS. 128).

Reference made by the Commissioner of Income Tax, Madras, under Section 66 (3) of the Indian Income Tax Act (XI of 1922). O. P. Nos. 267, 268 and 269 of 1932.

In accordance with the High Court's order dated April 23, 1934, the Commissioner of Income Tax, Madras, referred the following case for the decision of the High Court under Section 66 (3) of the Indian Income Tax Act, XI of 1922 :—

"2. The petitioners, Mr. A. Harvey and Mr. J. C. Harvey (the petitioner in O. P. No. 268 of 1932) and the firm of Messrs. A. & F. Harvey (the petitioner in O. P. No. 269 of 1932) are the three shareholders of the Comorin Investment and Trading Company, Ltd., (hereinafter referred to as the company) Tuticorin. Mr. A. Harvey and Mr. J. C. Harvey hold between themselves equally 9,999 shares and the firm of Messrs. A. & F. Harvey, 1 share out of a total of 10,000 shares of Rs. 100 each in the company. The firm of Messrs. A. & F. Harvey of whom Mr. A. Harvey and Mr. J. C. Harvey are the major partners owning between themselves equally 50 out of 64 shares is the manager of the company.

3. The Comorin Investment and Trading Company Ltd., is a private limited company registered on the 9th January, 1926, under the Indian Companies Act, its principal object being to acquire and hold stocks, shares, etc., in companies and other public bodies and distribute the income therefrom among its shareholders. The greater part of the income of the company is derived by way of dividends from its large shareholding in the Madura Mills Company, Limited. Year after year, ever since its inception in 1926, the company has earned large profits. These profits were not distributed as dividends to its shareholders but were carried to the Reserve Fund. The profits so derived by the company during the year 1929 30, (the previous year now in question) was Rs. 1,33,222 according to its profit and loss account. This with the balance in the profit and loss account brought forward from the previous year amounted to Rs. 2,98,680-12-11. No part of it was distributed as dividends; but the whole of it was disposed of as below :

	Rs.	A.	P.
Amount transferred to General Reserve ...	1,02,500	0	0
Amount transferred to Insurance Reserve ...	60,000	0	0
Balance	1,36,180	12	11

(A copy of profit and loss account is filed, marked Exhibit A). At the fifth ordinary general meeting of the shareholders held on the 30th May, 1930, the above balance (Rs. 1,36,180-12-11) was distributed as below :

		Rs. A. P.
Transferred to General Reserve	...	1,00,000 0 0
Transferred to Insurance Reserve	...	35,705 13 10
Balance	...	474 15 1
Total	...	1,36,180 12 11

The company's Reserve Fund stood at Rs. 5,29,294 with the amount transferred to it on 30th May, 1930.

4. On an examination of the profit and loss statement and balance sheet filed by the company for the assessment of the year 1930-31 (year of account; official year 1929 30) and its memorandum and articles of association it appeared to the Income Tax Officer, Tuticorin Circle (the assessing officer in this case)

(1) that the company was under the control of two of its members, Mr. A. Harvey and Mr. J. C. Harvey,

(2) that its profits were allowed to accumulate beyond its reasonable needs without being distributed among the members and (3) that it otherwise fulfilled the conditions laid down in Section 23-A (2) of the Act.

The Income Tax Officer therefore proposed to take action under sub-Section (2) of Section 23-A of the Act, and accordingly referred the matter to the Assistant Commissioner of Income Tax for his approval as required by this sub-section. The company objected and contended before the Assistant Commissioner :—

(1) that as it owed large sums of money to its creditors it would be improper to pay dividends to the shareholders until its current liabilities were reduced to a reasonable figure; and

(2) that its entire capital having been invested in fixed assets it had no fluid resources from which dividends could be paid.

The Assistant Commissioner overruled the first objection on the ground that the whole of the liabilities of the company except a negligible fraction was due to the firm, Messrs. A. & F. Harvey, the partners of whom were Mr. A. Harvey and Mr. J. C. Harvey (who were again the principal shareholders of the company) and the second objection on the ground that the profits could have been distributed as and when they were received before conversion into fixed assets.

He therefore found that the company had withheld "the distribution of its profits to its members with a view to enable its members to evade their proper share of super tax" and accordingly approved the proposal of the Income Tax Officer to apply the provisions of Section 23-A of the Act to the assessment of the company. A copy of the Assistant Commissioner's order dated 17th April, 1931, under Section 23-A (3) is filed, marked Exhibit B.

Thereafter the Income Tax Officer passed on 14th September, 1931 an order under Section 23-A (2). The order declares that the sum payable as income tax by the company shall not be determined and that the proportionate share of each member in the undistributed profits and gains of the company shall be included in the total income of each member for the purpose of his assessment thereon. A copy of his order is filed, marked Exhibit C.

5. The petitioner and the other two shareholders of the company lodged appeals with me under sub-Section (1) of Section 33-A of the Act putting forward the same objections as those raised by the company before the Assistant Commissioner and the Income Tax Officer. I concurred with the findings arrived at by the authorities below and therefore referred these appeals to a Board of Referees for decision under Section 33-A (3) of the Act.

After the submission of the petitions of appeal, however, the petitioner and the two other members of the company offered in their letter, dated 4th November, 1931, a new explanation for the company's failure to distribute the profits. They alleged that the company's large holding in the Madura Mills Company had fallen in value, that the depreciation in value on 31st March, 1930, was Rs. 2½ lakhs, that they had to provide for this and that this was why the company had carried its profits to the Reserve Account without distributing dividends to its shareholders. My opinion on this new contention was:

(1) that as it was neither raised before the authorities below nor mentioned in the petitions of appeal the petitioners should not be allowed to set up an entirely new case before the Board of Referees,

(2) that there was no evidence of this alleged purpose beyond the mere assertion of the petitioners, and

(3) that even if the shares fell in value during the years 1930 and 1931 there was no reason for the failure to distribute the profits of the years 1926, 1927 and 1928 when the shares had not depreciated in value and that therefore the explanation tendered by the petitioner, if it were to be considered at all, did not furnish a valid ground for disturbing the order of the lower authorities. A copy of my reference to the Board of Referees is filed, marked Exhibit D.

6. The Board of Referees overruled my preliminary objection and after taking into consideration the evidence produced by the petitioner and the other two members on the other points, arrived at the conclusion that the company was justified in not distributing Rs. 1 lakh out of Rs. 1,36,180, (the balance in the profit and loss account for 1929-30) among the shareholders, but that Rs. 36,180 ought to have been so distributed. A copy of the decision of the Board of Referees is filed marked Exhibit E.

7. The Income Tax Officer held that the result of the decision of the Board of Referees was that his order under Section 23 A (2) dated 14th September, 1931 was confirmed. The company has returned a total income of Rs. 1,83,727 as below :—

		Rs.	A.	P.
Net profits as per profit and loss account.		1,33,222	6	4
Add income tax paid, excess depreciation, tax deducted on dividends etc.,	...	50,504	13	5
Total	...	1,83,727	3	9

The Income Tax Officer accepted the figure and in accordance with his order under Section 23-A (2) he did not determine the income tax payable by the company but added the proportionate share of each shareholder in the profits and gains of the company to his individual income and assessed the shareholders accordingly.

8. The petitioner and the other two members then filed applications before me under Section 66 (2) of the Act and required me to state a case and refer two questions for the decision of the High Court. I declined to state a case on the ground that no question of law arose. A copy of my order is filed marked Exhibit F.

9. The petitioner and the other two members thereupon moved the High Court under Section 66 (3) of the Act and by its order dated 23rd April, 1934, the Court has directed me to state a case on the following question.

"Whether Section 23-A could be legally applied to this case, there being no finding that failure to distribute Rs. 36,180 was with a view to prevent the imposition of tax on any of the shareholders".

10. It will be seen from the facts given in paragraphs 4 and 5 above that the reference to the Board of Referees in this case arose out of the findings of the Income Tax Officer and the Assistant Commissioner with which I agreed, that the company withheld distribution of its profits to its members with a view to enable its members to evade their proper share of tax and that therefore they were right in applying the provisions of Section 23-A (2) of the Act and in including the proportionate share of each member in the profits of the company in his individual assessment. The only point on which the Board of Referees differed from the income tax authorities was in regard to the amount of profit available for distribution as dividends by the company. The finding of the Board of Referees was that the company was justified in not distributing Rs. 1 lakh out of the profit, that so far as the balance of Rs. 36,180 in the profit was concerned the failure to distribute it was not for the purpose of providing for the

reasonable needs of the company and that it should have been distributed as dividends. The decision does not disturb any other findings of the authorities below. One of such findings was that the failure to distribute the profits was intended to enable the members to evade supertax in respect of their shares of the profits. It follows that the Board of Referees agreed with the income tax authorities that the failure to distribute Rs. 36,180 was with a view to avoid tax on that sum. It is not to be supposed that the Board of Referees who carefully considered all the points and contentions raised by the petitioners failed to ask themselves whether the company's object was to evade super-tax. In my opinion therefore the decision undoubtedly implies confirmation of the previous finding on this point. The question shall be answered accordingly."

M. Subbaroya Ayyar, T. V. Visvanatha Ayyar, and *T. S. Krishnamurthi Ayyar*, for the assessees.

M. Patanjali Sastri, Special Counsel for the Commissioner of Income Tax.

JUDGMENT.

THE CHIEF JUSTICE.—The question under reference is:

"Whether Section 23-A could be legally applied to this case, there being no finding that failure to distribute Rs. 36,180 was with a view to prevent the imposition of tax on any of the shareholders."

Sub-section 2 of Section 23-A which is the one in question reads as follows:

"Where the Income Tax Officer is satisfied that a company is under the control of not more than five of its members and that its profits and gains are allowed to accumulate beyond its reasonable needs, existing and contingent, having regard to the maintenance and development of its business, without being distributed to the members, or that a reasonable part of its profits and gains having regard to the said needs, has not been distributed to its members in such manner as to render the amount distributed liable to be included in their total income, and that such accumulation or failure to distribute is for the purpose of preventing the imposition of tax upon any of the members in respect of their shares in the profits and gains so accumulated or not distributed, the Income Tax Officer, may, with the previous approval of the Assistant Commissioner, pass an order that the sum payable as income-tax by the company shall not be determined, and thereupon the proportionate share of each member in the profits and gains of the company, whether such profits and gains have been distributed to the members or not, shall be included in the total income of such member for the purpose of his assessment thereon."

The facts of the case are that the assessees in the three cases before us, which have been ordered to be consolidated, are the three shareholders of the Comorin Investment and Trading Company, Limited, Tuticorin. The company is a private limited company registered on the 9th January, 1926 under the Indian Companies Act, its principal object being to acquire and hold stocks and shares in companies and other public bodies and distribute the income therefrom among its shareholders. The greater part of the income of the Company is derived by way of dividends from its large share holding in the Madura Mills Company, Limited. Year after year since 1926 the Company earned large profits. These profits were not distributed as dividends to its shareholders but were carried to the Reserve Fund. During the year 1929-1930 the profit so derived was Rs. 1,33,222 according to the profit and loss account. This, with the balance in the profit and loss account brought forward from the previous year amounted to Rs. 2,98,680-12-11. No part of it was distributed as dividends but the whole of it was disposed of as below:

	Rs.	A.	P.
Amount transferred to General Reserve ...	1,02,500	0	0
Amount transferred to Insurance Reserve ...	60,000	0	0
Balance	1,36,180	0	0

At the fifth ordinary general meeting of the shareholders held on the 30th May, 1930 this balance of Rs. 1,36,180-12-11 was distributed as follows:

	Rs.	A.	P.
Transferred to General Reserve ...	1,00,000	0	0
Transferred to Insurance Reserve ...	35,705	13	10
Balance	474	15	1
Total ...	1,36,180	12	11

The Income Tax Officer, Tuticorin Circle, the Assessing Officer, held (1) that the company was under the control of its members Mr. A. Harvey and Mr. J. C. Harvey; (2) that its profits were allowed to accumulate beyond its reasonable needs without being distributed among its members; and (3) that the conditions laid down in Section 23-A (2) of the Act were fulfilled. He therefore, proposed to take action under that section and accordingly referred the matter to the Assistant Commissioner of Income Tax for his approval as required by that sub-section. The Company objected and contended before the Assistant Commissioner that as it owed large sums of money to its creditors it would be improper to pay dividends to the shareholders until its current liabilities were reduced to a reasonable figure and that, its entire capital having been invested in fixed assets, it had not fluid resources from which dividends could be paid. Both the objections were overruled by the Assistant Commissioner. He accordingly

approved of the proposal of the Income Tax Officer to apply the provisions of Section 23-A of the Act to the assessment of the company; and, therefore, the Income Tax Officer passed an order under Section 23-A (2) on the 14th September, 1931. The assessees lodged appeals with the Commissioner under sub-section (1) of Section 23-A of the Act putting forward the same objections as those raised by the company before the Assistant Commissioner and the Income Tax Officer.

The Commissioner concurred with the findings arrived at by the two latter and referred the appeals to a Board of Referees for decision under Section 33-A (3) of the Act. After the submission of the petitions of appeal, however, the petitioners offered in a letter dated the 4th November, 1931 a new explanation for the company's failure to distribute the profits alleging that the company's large holding in the Madura Mills Company, Limited, had fallen in value, that the depreciation in value on the 31st March, 1930 was Rs. 2½ lakhs, that they had to provide for this and that this was why the company had carried its profits to the Reserve Account without distributing dividends to its shareholders. The Income Tax Commissioner was of the opinion that this point should not be allowed to be considered before the Board of Referees as it was an entirely new case and, even so, the explanation did not furnish a valid ground for disturbing the order of the lower authorities. The Board of Referees overruled the Income Tax Commissioner's objection that an entirely new case could not be considered and after taking into consideration the evidence produced by the assessee arrived at the conclusion that the company was justified in not distributing Rs. 1,00,000-0-0 out of the Rs. 1,36,180 amongst the shareholders but that the Rs. 36,180 ought to have been so distributed. In the order of the Board of Referees the latter amount is dealt with as follows:—

"In the same meeting it has also been resolved to place Rs. 35,405-13-10 the remaining amount of the profits of the year towards the Insurance Reserve Account. We have not been shown what this Reserve Account is. Nor have we been convinced that the company is entitled to set apart such an amount towards the insurance account without distributing the same among the shareholders."

Accordingly the Income Tax Officer held that the result of the decision of the Board of Referees with reference to the Rs. 35,705-13-10 was that his order under Section 23-A (2) was confirmed. He, therefore, did not determine the income-tax payable by the company but added the proportionate share of each shareholder in the profits and gains of the company to his individual income and assessed the shareholders accordingly. The Income Tax Commissioner declined to state a case to the High Court; and accordingly the matter came up to the High Court, and the order was made directing him to state a case raising the question propounded here. Hence this reference.

The assessees' contention here is that what is required by sub-section (2) of Section 23-A is a finding that the failure to distribute the profits is for the purpose of preventing the imposition of tax upon any of the members and that the Board of Referees did not so find when they held that the sum in question ought to have been distributed. On the other hand, the Income Tax Commissioner contends that it follows from the finding of the Board of Referees that they agreed with the income tax authorities that the failure to distribute the sum in question was with a view to evade tax on that sum. Our attention was drawn during the course of the argument to a number of English decisions upon the similar section in the English Act—Section 21 of the Finance Act of 1922—but a distinction between the Indian section and the English section has been pointed out quite properly by the assessees' learned Counsel. In the English section the purpose of preventing the avoidance of tax is set out in the form of a preamble to the section as follows:

"With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows;"

And it has been held in *David Carlaw & Sons Ltd.* v. *The Commissioners of Inland Revenue* (11 Tax Cas. 96) that this being so, it is not necessary that the Special Commissioners have to be satisfied that there has been an intention to evade tax before a direction can be made under Section 21 of the Finance Act because the preamble of Section 21 cannot either restrict or extend the enacting provisions in the section and that condition does not appear there.

LORD SANDS on page 120 says :

"It is quite open to the shareholders of the company to satisfy the Special Commissioners that they had a reasonable cause for withholding from distribution a considerable part of their profits. If they fail to do so, if they cannot show the Special Commissioners that they were influenced by that purpose, and that it was a reasonable purpose, then, in the view of the legislature, there is a presumption of law that avoidance of super-tax is the object of the retention of the undistributed profits, and it is unnecessary in a particular case that the Commissioners should so find."

In the Indian Act the condition as to intention to evade payment of tax appears in the section itself. Under the English section companies are as it were classed under two heads; those that reasonably distribute and those that do not—and, where a company is proved to be in the latter class, the consequences of the section follow and the whole of the undistributed profits become liable to be taxed as if distributed to the shareholders. (*Glazed Kid Limited* v. *The Commissioners of Inland Revenue* (15 Tax Cas. 445); *Colville Estate Limited* v. *The Commissioners of Inland Revenue* (15 Tax Cas. 485); and *London and Northern Estates Company Limited* v. *The Commissioners of Inland Revenue* (16 Tax

Cas. 128). I do not think it necessary to refer to any of the other decisions cited under the English Act. Relying on the express words of the section the assessees contend that the income tax authorities have not proved any such intention, that the Board of Referees have not recorded any verdict upon this point and that there is no presumption of law that there was any unreasonable withholding from distribution of the profits, with that object in view. Mr. Patanjali Sastri, on the other hand points out that the assessees started the company in 1926 and that they hold all the shares and have distributed none of the profits during any of the years up to 1930. He contends that the assessees formed themselves into a company for the purpose of withholding the profits from distribution in order to evade income tax, that the depreciation in the Madura Mills was only in 1929-1930 and that nevertheless these large earnings were withheld from distribution in previous years. He argues that that was their intention then and that in the year in question they did not change their intention and emphasises the very important fact that the explanation which was put before the Board of Referees was one which was put before them for the first time and was not the explanation given to the income-tax authorities originally. The income tax authorities had expressly found that the assessees had allowed Rs. 1,36,180-9-4 to accumulate beyond the company's reasonable needs and had done so in order to evade the tax. The Board of Referees have found against the income tax authorities with regard to Rs. 1,00,000 but agree with them that Rs. 36,180-9-4, had been allowed to accumulate beyond the reasonable needs of the company. What is the effect of that finding? The issue as between the income tax authorities and the assessees was whether the sums of money had been withheld from distribution with the object named. The assessees contended that it was not with that object at all but with another object, namely, as regards the particular sum, *viz.*, 35,705-13-10, of keeping it in the Insurance Reserve Account. The Board of Referees have found that the company was not entitled to do this and, therefore, the only reason put forward against the contention of the income tax authorities was negatived. No other explanation was put forward before the Board of Referees and consequently there was failure on the part of the assessees to furnish any reasonable answer to the income tax authorities' contention. After all, what is it that the income tax authorities have to do before they can apply Section 23-A (2)? They have to be satisfied that the failure to distribute is for the purpose of preventing the imposition of tax upon any of the members of the company. How is this purpose to be proved? Human motives are obscure, difficult of ascertainment and sometimes conjectural; and it seems to me that this must be a matter largely of inference. Are the facts here sufficiently strong to warrant such an inference? The failure to distribute any part of the profits of the company which were very large in any year after its inception and the failure of the assessees to explain the very large accumulation of profits withheld from

distribution in the year in question seem to me to lead to only one conclusion, namely, an intention to prevent the imposition of tax; and I am unable to agree with the contention of the assessees that the finding of the Board of Referees can have any other implication put upon it except that it is in agreement with the view of the income-tax authorities. The result is that, in my view, the question propounded should be answered in the affirmative.

Costs Rs. 400 to the Commissioner of Income Tax.

PANDRANG ROW, J.—I agree with my Lord, the Chief Justice.

CORNISH, J.—I am of the same opinion. Before an Income Tax Officer can assess the share-holders of a company under S.23-A (2) of the Indian Income Tax Act on accumulated or undistributed profits of the company he has to be satisfied on two heads. *Firstly*, that the profits of the company have been allowed to accumulate beyond the existing and contingent needs of the company, having regard to the maintenance and development of the company, *or* that a reasonable part of the profits, having regard to the said needs, have not been distributed to its members. *Secondly*, he must be satisfied that such accumulation or failure to distribute is for the purpose of preventing the imposition of tax upon any of the members in respect of their shares in the profits so accumulated or not distributed. Unless both those conditions are satisfied, and in each case it is a question of fact, the members of the company do not become liable to assessment on their shares in the accumulated or undistributed profits. The Income Tax Officer in the present instance has found that the profits of the respondent company have been allowed to accumulate beyond the reasonable needs of the company. He does not exactly say that the accumulation was made for the purpose of evading taxation. It would have been better if he had been explicit. But the finding is to be implied from his statement that he was satisfied that the conditions laid down in the section had been fulfilled. Therefore, there must be taken to be a finding of fact that profits to the extent of 1,36,180 of Rupees had been accumulated beyond the reasonable needs of the company, and that the accumulation was designed to screen these profits from taxation. These findings of fact were confirmed by the Commissioner. The effect of the order of the Board of Referees, to whom a further appeal was carried, was to allow the company's appeal with regard to the sum of 1 lakh, which the Referees held was reasonably appropriated to meet depreciation in the company's assets. But with respect to the remaining Rs. 36,180 the appeal failed, and *pro tanto* the Commissioner's order stood. The Referees do not say that they find that the sum of Rs. 36,180 was accumulated for the purpose of escaping taxation. But it is clear that the appellants chose to stand or fall by their contention that the whole of the accumulation represented a genuine and reasonable need of the company, and when their claim failed to be substantiated in respect of the sum of Rs. 36,180

the finding of the income tax authorities that this part of the accumulation was for the purpose of evading taxation remained unaffected. The appellants might, I suppose, have contended before the Referees that even if the appropriation of this sum to the company's needs was not justified there was not sufficient proof that it was done with the intent to escape taxation. But there is no trace of such contention being put before the Referees. No question of law, therefore, arises in regard to it.

[IN THE OUDH CHIEF COURT.]

INCOME TAX OFFICER, LUCKNOW

v.

LUCKNOW SUGAR WORKS.

Srivastava, J.

May 1, 1935.

INCOME TAX—COMPANY—WINDING-UP—INCOME TAX DEBT—RIGHT OF OFFICIAL LIQUIDATOR TO CALL FOR PROOF OF DEBT—UNJUSTIFIABLE SUMMARY ASSESSMENT—NOT BINDING ON LIQUIDATOR—INDIAN COMPANIES ACT (VII OF 1913), SECTION 229—INCOME TAX ACT (XI OF 1922), SECTIONS 22 AND 23 (4).

A limited company upon which a notice was served under Section 22 of the Indian Income Tax Act to make a return of its income failed to do so within the prescribed time and a best judgment assessment was made on an estimated income of Rs. 40,000. The company was subsequently wound up and the official liquidator disputed the validity of the claim of the income tax authorities in respect of the income tax so assessed. Held, *that though the assessment was binding on the company, yet under Section 229 of the Indian Companies Act the official liquidator was entitled to call upon the income tax authorities to prove their claim and that it was the duty of the winding up Court to see that the debt was valid and binding on the estate.* Held further, *on the facts, that as the accounts of the company showed that the company had not made any profits in the year in question, the assessment was unjustified and not binding on the official liquidator.*

Cases referred to :

UNION INDIAN SUGAR MILLS CO. *v.* BRIJ LAL JAGANNATH [1927] I.L.R. 49 All. 728; 25 A.L.J. 450; 102 I.C. 756.

VAN LAUN *In re*; CHATTERTON *ex parte* (1907) [2 K. B. 23; 97 L.T. 69; 76 L.J.K.B. 644; 23 T.L.R. 384].

Commercial Case No. 3 of 1933 decided on May 1, 1935.

JUDGMENT.—This is an affidavit filed by the Income Tax Officer, Lucknow, in pursuance of the notice issued by this Court under Rule 49 of the rules framed by this Court under the Indian Companies Act. He claims that at the date of the winding up order the company stood indebted to the income tax department

for Rs. 5,770-14-0 on account of income tax and surcharge for the assessment year ending on 31st March, 1934. The official liquidator disputes the claim. The admitted facts of the case are that on 12th April, 1933, a notice was issued by the income tax department under Section 22, Income Tax Act, requiring the company to file a statement of its income during the previous year for assessment for the year 1933-34. The Secretary of the company, on 15th April, 1933, sent a reply saying that the accounts were being audited and that the return called for by the Income Tax Officer would be submitted after the audit had been completed and accounts passed by the shareholders. The income tax authorities without waiting for the completion of the audit or the passing of the accounts by the shareholders assessed the company on 25th July, 1933 at an income of Rs. 40,000 to an income tax of Rs. 6,770-14-0. A notice of demand for this amount was served on the company.

The Secretary of the company moved the income tax authorities to cancel the assessment but without success. There is no doubt that the income tax authorities were within their rights in making the assessment on an estimated income when the company had failed to file the return of its income within the prescribed time. It is equally clear that the assessment made by the income tax department was binding on the company. But the question arises whether the debt is also binding on the liquidator or whether it is open to him to question its validity. It has been argued by the learned Government Advocate that the debt in question stands on the same footing as a decretal debt, and there being no question of the order making the assessment being collusive or fraudulent, it must be held to be binding on the official liquidator. Section 229 of the Companies Act provides that in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. Section 34 (2) of the Provincial Insolvency Act lays down that save as provided by sub-Section (1) of that section all debts and liabilities, present or future certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under the Act.

This provision applies to all debts including judgment debts. The section requires the debt to be proved. This shows that merely because a debt is a judgment debt it does not follow that it must be accepted as a matter of course without scrutiny. *In Union Indian Sugar Mills Co., Ltd.* v. *Brij Lal Jagannath*, it was held that where there has been a genuine contest between a

claimant on the one hand and a company which goes into liquidation later on on the other, and the parties have fought out the case *bona fide*, it should not be open to the official liquidator to reopen the case or to go behind the judgment and to look into the consideration for the same, but where a decree rests on something less than a real trial on the merits of the case or there are circumstances justifying the official liquidator to doubt the *bona fides* of the judgment or to suspect a miscarriage of justice, it would be open to the official liquidator to reject the decree and call for fresh proof of the claim. A number of English authorities have been cited in this case in support of the proposition that it is open to the Court of Bankruptcy to look into the "consideration for the judgment." In one of these case *In re Van Laun, ex parte Chatterton*, it was remarked:

"It is well settled that the Court can inquire into the consideration for a judgment-debt...If there be a judgment it is not necessary to show fraud or collusion. It is sufficient, in the language of LORD ESHER, to show miscarriage of justice, that is to say, that for some good reason there ought not to have been a judgment."

The circumstances of the present case show that the assessment had been made on an estimated income without the accounts being looked into. It is the duty of the Court of Bankruptcy to protect the interests of the entire body of creditors and to see that a debt claimed to be entered in the schedule is valid and properly binding on the estate. The audited accounts for 1932-33 have been shown to me. They have also been examined by the learned Government Advocate who has nothing to say against their correctness. These accounts show that the company did not make any profit during the year. On the contrary it suffered a loss of Rs. 3,54,234-1-2. Under the circumstances the assessment is clearly unjustified and I am not prepared to treat the debt as valid or properly binding on the company. The result is that I disallow the claim.

Claim disallowed.

[IN THE LAHORE HIGH COURT.]

KANGRA VALLEY SLATE CO., LTD.

v.

COMMISSIONER OF INCOME TAX, PUNJAB AND N. W. F. P.

Addison and Sale, JJ.

June 28, 1934.

INCOME TAX—BUSINESS EXPENDITURE—COMPANY ENGAGED IN QUARRYING SLATES—EXPENSES INCURRED IN LITIGATION TO DEFEND EXCLUSIVE RIGHT TO QUARRY AGAINST CLAIMS OF THIRD

PERSONS—WHETHER BUSINESS EXPENDITURE—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 10 (2) (ix).

The assessees carried on the business of manufacturing slates and for this purpose had obtained under a lease the exclusive right of quarrying slate in a particular village. The proprietors of the village instituted a suit to eject the assessees and to restrain them by injunction from quarrying and the assessees incurred an expense of Rs. 13,397 in defending themselves before the Courts. The question being whether the sum of Rs. 13,397 thus spent was expenditure incurred solely for earning profits within Section 10 (2) (ix) of the Income Tax Act or a capital expenditure: Held, *that the expenditure incurred, being a non-recurring outlay required to retain a capital asset, was in the nature of capital expenditure.* Held also, *that the question whether an expenditure in respect of which a deduction is sought is capital or not is in its essence a question of fact.*

Cases referred to:

MORANT *v.* WHEAL GRENVILLE MINING CO. (3 TAX CAS. 298).

SMALL *v.* EASSON (12 TAX CAS. 351).

USHER'S WILTSHIRE BREWERY LTD. *v.* BRUCE (6 TAX CAS. 399).

VALLAMBROSA RUBBER CO., LTD. *v.* FARMER (5 TAX CAS. 529).

Case stated by the Commissioner of Income Tax, Punjab and N. W. F. P., under Section 66 (2) of the Indian Income Tax Act

The material portion of the statement of the case was as follows :—

"FACTS OF THE CASE.—The facts of the case are that the company which is engaged in the quarrying and manufacture of slates for sale, submitted a return of its income as required by Section 22 (1) of the Act for the year ending 30th June, 1930, which is the "previous year" for the purpose of assessment for the year 1931-32. The return which was accompanied by an audited balance sheet and a profit and loss account showed a net income of Rs. 23,359 which was arrived at after deducting a sum of Rs. 13,397 on account of legal expenses incurred in connection with a civil suit brought against the company by certain zamindars of Kanyara in the Kangra District, questioning the lease of certain land held by them. The suit was decided against the company by the Senior Sub-Judge of Kangra, who granted a decree of ejectment in favour of the plaintiffs for the major portions of the land in suit. The company claimed a deduction of the legal expenses incurred in defending the suit, under Section 10 (2) (ix) of the Income Tax Act. The Income Tax Officer remarked that the whole sum of Rs. 13,397 was incurred in defending the suit brought

against the company for ejectment or dispossession of it. He, therefore, held that it was expenditure in the nature of capital and as it was not incurred solely for the purpose of earning the profits and gains of the business, it did not fall within the purview of Section 10 (2) (ix). The claim was accordingly disallowed. An appeal followed, but was rejected by the Assistant Commissioner, who upheld the finding of the Income Tax Officer.

The facts according to the assessee are that the company held a lease of certain lands in the Kangra District for excavating slates and working mines. On the 10th July, 1923 the proprietory body of village Kanyara consisting of 1350 members instituted a suit against the company for dispossession of the company from 614 kanals 8 marlas of land covered by the mines and for issue of a permanent injunction restraining the company from excavating any slates in the *Shamlet Deh*. On the 11th July, 1933 the Court of the Senior Sub-Judge Kangra at Dharamsala decreed the claim in full in favour of the plaintiffs, the proprietory body of the village Kanyara, for ejectment of the company from the lands containing slate mines measuring 614 kanals 8 marlas and for issue of a permanent injunction against the company as prayed for in their plaint, holding :—

(1) that the assessee company was not a lessee of the land in suit,

(2) that the company shall be considered as trespassors on land in suit, and

(3) that the company had made certain encroachments by constructing roads which were to be stopped.

The company incurred the expenditure required in defending the suit and in preferring an appeal in the High Court against the decree of the Senior Sub-Judge and also in applying for the stay of execution of the decree of the first Court and for issue of injunction against the plaintiffs restraining them from interfering in the defendant company's *status quo* of the right of excavating according to the terms of the lease.

Copies of the assessment and appellate orders are attached as Appendix A and B.

3. Of the four questions formulated by the petitioner, the first and third do not arise as they were not raised in appeal, while the fourth is not of any importance for the purposes of this case. The only question which can arise in this case is whether the expenditure incurred in defending the suit for dispossession of certain land alleged to have been wrongly held by the company is a deduction which is allowable under Section 10 (2) (ix) of the Act. This is identical with question (2) as formulated by the petitioner and I proceed to record my opinion on it.

4. OPINION OF THE COMMISSIONER.—The section of the Act under which the claim is preferred 10 (2) (ix), allows as a deduction "any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits and gains". Two conditions have thus to be fulfilled before the deduction can be allowed, *viz*: (1) The expenditure must not be in the nature of capital expenditure. (2) It must have been incurred solely for the purpose of earning the profits and gains."

The term 'capital expenditure' is not defined, but as remarked by SHAH, J., in the case of the *Tata Iron and Steel Company* (1 I.T.C. 125) the words "In the nature of capital expenditure make the meaning of the expression more elastic in its application to the facts of each case". We have thus to consider the facts in their relation to the case under consideration. The subject matter of the suit was the land which produced the slate stones. The land thus represents the capital and the slates excavated therefrom represent the income arising from the land or capital. If this view is accepted, it follows that the expenditure on litigation, connected with the possession of the lands which really represent the capital of the business, is expenditure in the nature of capital. That being so, it is not necessary to consider whether it can be said to have been expended solely for the purpose of earning the profits of the business which arise from the slates excavated from the land. In my opinion, therefore, the answer to the question should be given in the negative.

Badridas, for the Appellant.

Jagannath Aggarwal, for the Commissioner.

JUDGMENT.

The Commissioner of Income Tax has referred to us for our opinion the question whether the expenditure incurred by the Kangra Valley Slate Company, Limited, in defending as lessee of certain land in Mauzar Kanhyara, District Kangra, a suit for possession and injunction instituted by the lessors who are the proprietary body of that village, is deductible under clause (ix) sub-section 2 of Section 10 of the Income Tax Act.

The material facts of this case are that the Kangra Valley Slate Company, Limited, by lease dated the 22nd February, 1897 secured in prepetuity the exclusive right of quarrying slate in Kanhyara Village of the Kangra District. The company is also a shareholder in the Village Shamilat and as such enjoyed quarrying rights in common with the proprietary body; but the essence of the company's business is that by reason of the lease it enjoys a monopoly of slate quarrying in this village.

This monopoly has been recently assailed by the village proprietary body who on the 10th July, 1928 instituted a suit to eject the company from the quarries covered by the lease and also for an injunction to prevent the company from quarrying. On 11th July 1930 a decree was passed against the company by the trial

Court and an appeal against that decree is pending in this Court. The company have obtained stay of execution so far as the injunction is concerned so that the business of the company continues during the pendency of the appeal. In submitting a return of its income for the year ending 30th June, 1930, which is the "previous year" for the purpose of assessment under consideration (1931-32) the company showed a net income of Rs. 23,350 which was arrived at after deducting Rs. 13,397 on account of the legal expenses of the suit to date. The Income Tax Officer supported by the Commissioner of Income Tax, has held that no deduction is permissible because the legal expenses were expenditure in the nature of capital, and since it was not incurred solely for the purpose of earning the profits and gains of a business it did not fall within the purview of Section 10 (2) (ix) of the Income Tax Act. Para (ix) of Sub-Section (2) of Section 10 of the Income Tax Act provides that allowances may be made on :—"any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

Mr. Badri Das on behalf of the company urges that the cost of the litigation was incurred to defend the monopoly of quarrying which is the very life-blood of the company. For this reason he contends that the expenditure should be held to have been incurred solely for the purpose of earning profits or gains ; if the monopoly were lost, the business of the company would come to a standstill, and there would be no profits or gains. Further, he contends that the expenditure is debitable to revenue and it is not capital expenditure and that for these reasons the deduction is permissible under the clause. The opinion of the Commissioner is that since the subject-matter of the suit represents the capital of the company, the expenditure on litigation was incurred to defend the capital of the business and must therefore, be deemed to be in the nature of capital expenditure. Accordingly he holds that no deductions can be permitted.

No authority applicable to the facts of this case has been cited before us at the Bar. Counsel for the assesseee has invited our attention to a British case reported as *Usher's Wiltshire Brewery Ltd.* v. *Bruce*, in which a brewery Company as lessees of a number of houses which they had acquired in the course of their business, claimed deductions on account of certain expenditure as being money wholly and exclusively laid out for the purpose of the brewery: and this claim was upheld on appeal to the House of Lords. The only point of relevance in this case is that a sum of £66-2-8 was included in the expenses thus claimed and allowed as legal and other costs. This authority however, has no bearing upon the present case partly because this item for legal expenses being trifling in comparison with the other expenses claimed passed practically unnoticed in the course of the legal discussion and also because (as would appear from page 410 of the ruling) it was agreed between counsel at the commencement that these legal expenses were not

incurred for any extension of the business so as to make them "capital expenses." In our opinion the answer to the reference made by the Income Tax Commissioner in the present case depends upon the question whether the legal expenditure incurred by the Kangra Valley Slate Company was or was not in the nature of capital expenditure; and since it was agreed that the legal expenses permitted in *Usher's Case* (6 Tax Cases 399) were not to be considered capital expenditure, the authority has no bearing on the present dispute.

As observed by WRIGHT, J. in *Morant* v. *Wheal Grenville Mining Company*, the question whether certain expenditure in respect to which a deduction is sought is capital or not is in its essence one of fact; and as such it is open to question whether this is a permissible reference to us under Section 66 of the Income Tax Act. But we have no doubt that this reference should be treated as involving a question of law. It should however be understood that in answering this reference we are not deciding any question of principle. But we are giving our opinion which is relevant solely to the facts of the case before us.

The Income Tax Act does not contain any definition of the term 'capital expenditure' nor has any definition been attempted in the various authorities cited at the Bar. The nearest approach to a definition of capital expenditure occurs in certain observations by LORD DUNEDIN in the case of *Vallambrosa Rubber Co., Ltd.* v. *Farmer*. LORD DUNEDIN observed (on page 536) as follows: "I think it is not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all and income expenditure is a thing that is going to recur every year." This text laid down by LORD DUNEDIN was approved in the case of *Small* v. *Easson*, in which the LORD JUSTICE CLERK at page 355 observed that this criterion has been accepted in several subsequent cases.

The expenditure incurred by the Kangra Valley Slate Company, Limited, in the present case was clearly a non-recurring outlay required to retain a capital asset. Following the criterion laid down by LORD DUNEDIN in the *Vallambrosa Case* we hold that the expenditure incurred by the Kangra Valley Slate Company, Limited, in this particular case is in the nature of capital expenditure and we agree, therefore with the Commissioner of Income Tax in answering the question referred to us in the negative.

Question answered in the negative.

[In the Calcutta High Court.]

LALCHAND
v.
COMMISSIONER OF INCOME TAX, BENGAL.

Sir Harold Derbyshire, C.J., and Costello, J.

July 9, 1935.

Income Tax—Firm—Order Cancelling Registration of Firm—Appealability—Law before Amendment in 1933—Effect of Right to Appeal from Order of Assessment—Indian Income Tax Act (XI of 1922), Sections 30 (1) and 26-A.

Prior to the amendment of Section 30 (1) of the Indian Income Tax Act in November, 1933, there was no right of appeal from the refusal on the part of an Income Tax Officer to register a firm under the provisions of Sec 26-A of the said Act. The fact that there was an appeal against the amount under Sec. 30 (1) and that the question of registration may indirectly affect the amount of tax payable by the assessee could not confer a right of appeal in such a case.

Cases referred to:

Behari Lal Ghasiram *v.* Commissioner of Income Tax, Punjab and N.W.F.P. [7 I.T.C. 345].

Haji Ali Jan *v.* Commissioner of Income Tax, Punjab and N.W.F.P. [1934 I.T.R. 452; 7 I.T.C. 373].

Jai Dayal Madan Gopal [6 I.T.C. 226].

Case stated by the Commissioner of Income Tax, Bengal, under Section 66 (3) of the Indian Income Tax Act (XI of 1922). Ref. No. 5 of 1934.

The case stated by the Commissioner was as follows:—

"As directed by their Lordships, the Judges of the Calcutta High Court, in their order dated the 3rd July, 1934 on the application of the above assessee, a statement of case is submitted below under Section 66 (3) of the Income Tax Act.

2. The questions of law formulated by their Lordships arise out of an assessment made for the year 1932-33 on the income of the assessee as an unregistered firm carrying on the business of jewellers and silk merchants in the Hogg Market and at Lindsay Street, Calcutta, and at Shillong and Cawnpur. The Income Tax Officer made an assessment in that year on a total income of Rs. 68,648, which income was reduced on appeal by the Assistant Commissioner by a nominal amount without however, conceding the assessee's claim on the points which have finally come before their Lordships.

3. For some years prior to the year in question, the Income Tax Officer had allowed registration of the assessee under Section 26-A of the Act treating it as a firm constituted as follows :—

1.	Satramdas Dhalmall	...	Joint capitalist partners holding Rs. 0-7-0 share.
2.	Lalchand Dhalmall	...	
3.	Lokumall Satramdas	...	
4.	Hemandas Satramdas	...	0-2-5.
5.	Chalaram Lokumall	...	0-2-5.
6.	Harumall Lalchand	...	0-2-5.
7.	Bhagchand Lokumall	...	0-1-9.

In the year in question, however, he declined to renew registration on the ground that the first 3 parties referred to above were themselves a firm and one firm in its corporate capacity could not be a partner in another firm and therefore there could legally be no registration of that second firm : *Jaidayal Madan Gopal* v. *Commissioner of Income Tax, United Provinces.*

4. I append to this statement of case a copy of the deed dated 18th July, 1927, (marked A) under which Satramdas Dhalmall, Lalchand Dhalmall and Lokumall Satramdas constituted themselves a firm for the purpose of carrying on a business at Park Street, Calcutta, at two shops in the Municipal Market, Calcutta, and at two branches in Cawnpur and Shillong, copy of another deed dated the 10th August, 1927, (marked B) bringing in (1) Hemandas Satramdas (2) Chalaram Lokumall (3) Harumal Lalchand (4) Bhagchand Lokumall as additional partners in the shops in the New Market, Calcutta and in the branches at Shillong and Cawnpur and allotting to the earlier partnership a joint 7 annas share, while the four newcomers were given respectively 0-2-5, 0-2-5, 0-2-5, and 0-1-9 share, and copy of a third deed dated the 22nd February, 1930 (marked C) giving these four newcomers identical shares in a new business acquired at Lindsay Street in Calcutta. In view of the terms of these deeds read with the application for registration under Section 2 (14) of the Act, a copy of which is appended (marked D) and where the name of the first partner in the firm is noted as "the registered firm of Messrs. Satramdas and others" I do not think it can any longer be contended that in respect of the assessment with which we are here concerned the applicants for registration of the first party were in reality the individual partners in the firm of Messrs. Satramdas and others.

5. The grounds on which the applicant-assessee appealed to the Assistant Commissioner are set out below :—

"(*a*) The principle laid down in the case of *Jaidayal Madangopal* has been wrongly applied to your petitioner's case.

(*b*) The principle laid down in the case of *Jaidayal Madangopal* has not been properly appreciated and does not in law stand in the way of your petitioners' application for registration.

(c) The partners of your petitioners' firm are partners in their individual capacities and not as representatives of any firm or firms and the case of *Jaidayal Madangopal* favours and is not against the registration and recognition of the partners of your petitioners' firm.

(d) That there was no admission in the sense taken by the learned Income Tax Officer and your petitioners meant and intended to mean that the individual members were partners and not any firm as a whole. The case relied upon by the learned Income Tax Officer does not support the view taken by him.

(e) That appellants further submit that the constitution of the firm having remained unaltered Rule 6 applies and the learned Income Tax Officer acted without jurisdiction in cancelling the registration."

The Assistant Commissioner, however, rejected the appeal on the ground that as the law then stood, there was no appeal against the refusal of the Income Tax Officer to register a firm.

6. The questions of law on which I am asked to state a case by their Lordships' order are formulated as follows:—

(a) Whether the learned Assistant Commissioner was right in his interpretation of Sections 30 and 26-A of the Income Tax Act in holding that no appeal lies against an order refusing renewal of registration and thus failed to exercise jurisdiction which he had vested in him under the law?

(b) Whether by the imposition of the super-tax, the rate of assessment and the liability under the Act were not affected so as to confer on the petitioner abovenamed a right of appeal under Section 30?

(c) Whether the Income Tax Officer had any jurisdiction in refusing the renewal of registration and whether the order refusing registration was illegal and *ultra vires* so as to expose it to a challenge in appeal under Section 30 of the Act?

7. I beg to give my opinion below on these questions. Section 30 (1) of the Income Tax Act now runs as follows:

"Any assessee objecting to the amount or rate at which he is assessed under Section 23 or Section 27, or denying his liability to be assessed under this Act, or objecting to a refusal of an Income Tax Officer to register a firm under Section 26-A or to make a fresh assessment under Section 27, or to any order against him under sub-Section (2) of Section 25 or Section 25-A or Section 28, made by an Income-tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order."

The words underlined, however, were inserted by the Indian Income Tax (Second Amendment) Act, 1933, subsequent to the making of this assessment and subsequent to the passing of the order on appeal and presumably, therefore, the view of the legislature was that prior to the date on which this amendment came into force there was no right of appeal against an order of an Income Tax Officer refusing registration and I venture respectfully to submit that this view is correct. An appeal under Section 30 of the Act then lay only against anything decided in a proceeding leading to the assessment and the decision that a firm is or is not entitled to registration is not reached in these proceedings but in a separate proceeding under Section 26-A of the Act. Had such an appeal been contemplated under Section 30, as it stood before amendment, this would have been specified in the section as other sections, orders under which are appealable, have been specified. At 6 Tax Cases 390 I find an observation of SWINFEN EADY, J., to the following effect :—

"The rule of law is that although a *certiorari* lies unless expressly taken away, yet an appeal does not lie unless expressly given by Statute."

If then no appeal under Section 30 of the Act lay under the law in force at the time the assessment and appellate proceedings were disposed of, it follows that no application under Section 66 (2) or 66 (3) can lie. This same matter came before the Lahore High Court and their decision pronounced on the 21st June, 1934 though an *ex-parte* one which was in favour of the Crown, is reproduced below :

"There is no appearance for the petitioner. The answer to the question referred is in the negative as an appeal is not provided for in Section 30 of the Act from the refusal of the Income Tax Officer to grant registration. Let this reply go back : we understand that the law has since been amended to provide for such an appeal."

In another decision of the same Court (not yet published)* pronounced on the 27th June, 1934 in the case of *Haji Ali Jan* v. *Commissioner of Income Tax, Punjab*, their Lordships observed as follows :—

"In our opinion, however, the Income Tax Act cannot be interpreted in the same way as the Civil Procedure Code. The Income Tax Act is a special enactment which gives the authorities specific powers for purposes of assessment and these powers can only be attacked in the manner prescribed by the Act. Section 30 provides for appeals against certain specific orders and it necessarily follows in our view that orders passed under sections which are not mentioned in Section 30, are not appealable and are therefore final in the sense that they cannot be re-opened at any subsequent stage. We disagree with the proposition that an appeal against the final

* [Since published. See [1934] 2 I. T. R. 452.]

order of assessment justified the Income Tax Commissioner in re-opening by way of reference to us decisions relating to the method of assessment, which according to the scheme of the Act, are final merely because the assessment may be founded upon them. We adhere therefore, to our previously expressed view that under Section 30, before it was amended in November 1933, it was not open to the Commissioner to refer to us under Section 66, a question arising out of a refusal to register a firm under Section 26-A because the order was, at that time not appealable under Section 30, and therefore final."

I would respectfully submit therefore that questions (*a*) and (*b*) should be answered in favour of the Crown.

8. I now respectfully submit my opinion on the third question and will deal with the latter part of that question first. Even if the order refusing registration were illegal and *ultra vires*, in my respectful view it could not be challenged in an appeal under Section 30 of the Act, though of course, it would be open to the assessee to move the Commissioner in the matter under Section 33. The question whether the Income Tax Officer has jurisdiction to refuse the renewal of registration remains. In *Raghu Karson* v. *Commissioner of Income Tax* (5 I. T. C. 389) the Patna High Court held that when an application for registration of a firm is first filed before the Income Tax Officer, it is open to that officer to examine the document and to record such evidence as is necessary to enable him to determine whether what purports to be a firm, the registration of which is asked for, is in reality a firm or not and if the Income Tax Officer can for good cause refuse to register a firm in the first instance under Rule 4, I think he can equally well refuse to renew registration under Rule 6. All that Rule 4 and Rule 6 mean is that they presuppose the genuineness of the firm, the registration of which is requested and the real existence of the other requirements set out in the rule, and on this footing make it obligatory on the Income Tax Officer to grant a certificate of registration or to renew it. In my view, it is open to him to examine the genuineness or otherwise of these basic matters and only when he is satisfied regarding them, is he bound to follow the course laid down in the rules and the decision arrived at by the Income Tax Officer regarding the genuineness or otherwise of a firm in the course of one assessment proceeding is not, in my view, binding on him in subsequent assessments and it is open to him in a later assessment to reagitate the question and if he is satisfied that the firm is not genuine, to refuse registration on that ground. In my respectful view, therefore, the first part of question (*c*) should be answered in the affirmative and the second in the negative.

Dr. S. N. Banerjee, for the assessees.

Dr. R. B. Pal, for the Commissioner.

COSTELLO, J.—This matter comes before us under an order of this Court, dated the 3rd July, 1934, made upon the application of

a commercial firm carrying on business under the name of S. Lalchand. The Commissioner of Income Tax has submitted a case to the Court under the provisions of Section 66 (3) of the Income Tax Act.

The questions of law which were formulated at the time when the Rule was made absolute arise out of an assessment made on S. Lalchand for the year 1932-33 on income arising in that tax year in the concern, as an unregistered firm carrying on business as jewellers and silk merchants in the Hogg Market and at Lindsay Street in this City, and also at Shillong and Cawnpur. The Income Tax Officer has made an assessment for the year 1932-33 on a total income of Rs. 68,648, which income was reduced, on appeal to the Assistant Commissioner, by a nominal amount without however, the Assistant Commissioner, conceding the claim put forward by the assessee on the points which finally came before this Court.

For some years prior to the tax year, 1932-33, the Income Tax Officer had allowed registration of the assessee under the provisions of Section 26-A of the Income Tax Act and the assessee was treated as a firm constituted in the following manner:—

1. Satramdas Dhalmall }
2. Lalchand Dhalmall } Joint capitalist partners holding -/7/- annas share in the business.
3. Lokumall Satramdas }
4. Hemandass Satramdas.
5. Chalaram Lokumall.
6. Harumall Lalchand.
7. Bhagchand Lokumall.

The first three of the last four persons had two annas and five pies share each, and Bhagchand had 1 anna 9 pies share.

In the year with which we are concerned, however, the Income Tax Officer declined to renew the registration of these persons as a firm on the ground that the three first named persons were in themselves a firm and one firm in its corporate capacity could not be a partner in another firm. Consequently, there could not lawfully be a registration of that second firm, that is to say, the larger firm. As an authority for that proposition, the case of *Jai Dayal Madan Gopal* v. *Commissioner of Income Tax, United Provinces* was relied upon.

Two points have been argued before us by Dr. S. N. Banerjee on behalf of the assessee, namely, (1) that the Commissioner of Income Tax was wrong in coming to the conclusion that there was no appeal against the decision of the Assistant Commissioner refusing to renew the registration of the persons, whose names I have given, as a firm and (2) that the income tax authorities were wrong in taking the view that in the circumstances of this case, the whole of the seven persons would not constitute a

partnership which could be registered. As regards this last point Mr. Banerji has conceded that it is not possible, in law, for one firm in its corporate capacity to enter into a partnership with one or more other persons in their individual capacity. He argued however that in a case such as the present, it must be taken that the effect in law, of an agreement such as is contained in the partnership deed dated the 22nd February, 1930, would be to make all the seven individual partners in one firm and, therefore, a body which could be registered under Section 2C-A of the Act. As regards that aspect of the matter, it is not necessary that we should express any definite opinion, because we are definitely of the view that the learned Commissioner of Income Tax was right in coming to the conclusion that as the law stood at the time when this matter arose, there was no appeal from the decision of the Assistant Commissioner, refusing to renew the registration of this firm.

Mr. Banerji has argued that even under the terms of Section 30 of the Income Tax Act, as they stood prior to the amendment in the year 1933, there was, by implication, a right of appeal against the decision of the Assistant Commissioner on the question of registration. The unamended section, so far as is material, reads as follows; "Any assessee objecting to the amount or rate at which he is assessed under Section 23 or Section 27, or denying his liability to be "assessed under this Act, or objecting to a refusal of an Income Tax Officer to make a fresh assessment under Section 27, or to any order against him under sub-Section (2) of Section 25 or Section 25-A or Section 28, made by an Income Tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order."

Mr. Banerji then referred us to the actual terms of Section 23 itself and argued that the decision of the Income Tax Officer on the question of registration really affected the amount, if not the rate of tax payable by the assessee. Therefore, the opening words of sub-Section (1) of Section 30 were wide enough to confer a right of appeal against an order refusing registration. In the year 1933, Section 30 (1) was amended and it now runs as follows:— "Any assessee objecting to the amount or rate at which he is assessed under Section 23 or Section 27, or denying his liability to be assessed under this Act, or objecting to a refusal of an Income Tax Officer to register a firm under Section 26-A or to make a fresh assessment under Section 27, or to any order against him under sub-Section (2) of Section 25 or Section 25-A or Section 28, made by an Income Tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order".

The words "to register a firm under Section 26-A" were inserted by the Indian Income Tax (Second Amendment) Act of 1933. It must be taken that the legislature had in mind some definite purpose in inserting those words. The fact that Section 30, sub-Section (1), was so amended clearly indicates, in

our view, that prior to the making of such amendment, there was no right of appeal against the refusal of an Income Tax Officer to register a firm under Section 26-A. We are fortified in that view by two decisions of the High Court of Lahore, both of which are reported in Vol. VII of Income Tax Cases. The first is at page 345 and is reported under title *Messrs. Bihari Lal Ghasiram, Assessee* v. *The Commissioner of Income Tax, Punjab and N.W.F. Provinces, Referring Officer.* That matter was decided by Mr. JUSTICE ADDISON and Mr. JUSICE SALE. The judgment is very short, but very much to the point. It is in these words:—

"There is no appearance for the petitioner. The answer to the question referred is in the negative as an appeal is not provided for in Section 30 of the Act from the refusal of the Income Tax Officer to grant registration. Let this reply go back. We understand that the law has since been amended to provide for such an appeal."

The second case is *Haji Ali Jan* v. *The Commissioner of Income Tax, Punjab and N. W. F. Provinces.* That matter came before the same learned Judges and the judgment appears at page 373 of the report. At page 374 their Lordships say "The second point urged is the question that in the circumstances of this case the petitioner should be declared a registered firm under Section 26-A of the Act. The Assistant Commissioner refused to entertain the appeal against an order refusing registration, as no such appeal is provided for by Section 30 of the Act. It is true that the law has been altered by an amendment of the section made in November 1933; but we have held in other similar references under Section 66 of the Income Tax Act, that according to Section 30, as it stood before the amendment in November, 1933, no appeal lay against an order refusing registration under Section 26-A of the Act and no reference is therefore maintainable to this Court arising out of the rejection by the income tax authority of an application to register under Section 26-A ".

Then they referred to various authorities and discussed the matter at some length and finally, the learned Judges said: "The Income Tax Act is a special enactment which gives the authorities specific powers for purposes of assessment and these powers can only be attacked in the manner prescribed by the Act. Section 30 provides for appeals against certain specific orders and it necessarily follows in our view that orders passed under sections which are not mentioned in Section 30, are not appealable and are therefore final in the sense that they cannot be reopened at any subsequent stage. We disagree with the proposition that an appeal against the final order of assessment justified the Income Tax Commissioner in re-opening by way of reference to us decisions relating to the method of assessment, which according to the scheme of the Act are final, merely because the assessment may

be founded upon them. We adhere, therefore, to our previously expressed view that under Section 30, before it was amended in November, 1933, it was not open to the Commissioner to refer to us under Section 66 a question arising out of a refusal to register a firm under Section 26-A because the order was, at that time, not appealable under Section 30 and therefore final ".

Those observations, in my opinion, dispose of the argument put forward by Mr. Banerji, whereby he suggested that, as there was an appeal against the amount under Section 30 (1) as it originally stood, there was, by implication, an appeal against the refusal of the Income Tax Officer to register the assessee as a firm, because that non-registration may have affected the amount of the assessment. We agree with the two decisions of the Lahore High Court to which I have just referred and we, accordingly, hold that prior to the amendment of Section 30 (1) in the month of November, 1933, there was no right of appeal from the refusal on the part of the Income Tax Officer to register a firm under the provisions of Section 26-A of the Income Tax Act.

That disposes of this matter and it is not necessary that I should say anything more on the other point raised by Mr. Banerji. The answer to the case stated by the learned Commissioner of Income Tax is that we agree with his decision that there was no right of appeal against the order of the Income Tax Officer.

As regards costs, 7 gold mohurs will be paid to the vakil instructing the two Advocates, and, to the two Advocates, such fees as have been actually paid.

DERBYSHIRE, C. J.—I agree.

Reference answered accordingly.

[IN THE MADRAS HIGH COURT.]

JUPUDI KESAVA RAO

v.

COMMISSIONER OF INCOME TAX, MADRAS.

Madhavan Nair, Officiating Chief Justice, Stone, J., and King, J.

October 2, 1935.

INCOME TAX—HINDU UNDIVIDED FAMILY—DEATH OF FATHER—BUSINESS DEVOLVING ON SON BY SURVIVORSHIP—SON, WHETHER LIABLE TO BE ASSESSED AS SUCCESSOR TO BUSINESS —INDIAN INCOME TAX ACT (XI OF 1922), SECTION 26 (2)—" SUCCESSION", MEANING OF—HINDU AND HIS WIFE, WHETHER CAN CONSTITUTE A "HINDU UNDIVIDED FAMILY".

The word "succession" as used in Section 26 (2) of the Indian Income Tax Act connotes a transfer of ownership and the person who succeeds another must have by such succession become the owner of the business which his predecessor was carrying on and which he, after the succession, carries on in such capacity. Consequently, there is no "succession" within the meaning of Section 26 (2) where the business of a joint Hindu family devolves on a co-parcener by survivorship under Hindu Law.

A and his son B constituted a Hindu undivided family. A died after filing a return but before assessment and the family business devolved on B by survivorship. Held, *that B did not 'succeed' to the business within the meaning of Section 26 (2) of the Income Tax Act and B was not liable to be assessed as successor under Section 26 (2).*

Quaere: *Whether B and his wife constituted a "Hindu undivided family or whether B was liable to be assessed as an individual.*

Cases referred to :—

ARUNACHALAM CHETTIAR, V. R. S. A. R. *v.* COMMISSIONER OF INCOME TAX, MADRAS [1929] (3 I.T.C. 441 ; 122 I. C. 739 : A.I.R. 1929 Mad. 769 ; 57 M.L.J. 300).

MOOLJI SICKA, *In re* [1935] (3 I. T. R. 123).

VEDATHANNI *v.* COMMISSIONER OF INCOME TAX, MADRAS [1933] (63 M. L. J. 542 ; 1 I. T. R. 70 ; I.L.R. 56 Mad. 1 ; 140 I. C. 70 ; A. I. R. 1932 Mad. 733).

Case stated by the Commissioner of Income Tax, Madras under Section 66 (3) of the Indian Income Tax Act [O.P.No 147 of 1934.]

In accordance with the High Court's order the Commissioner of Income Tax, Madras referred the following case for the decision of the Hon'ble the Judges of the High Court under Section 66 (3) of

the Indian Income Tax Act, XI of 1922 (hereinafter referred to as 'the Act').

2. "The petitioner, J. Kesava Rao and his father, J. Gangayya constituted a Hindu undivided family. The family derived income from business in money-lending carried on at Bhimavaram within the jurisdiction of the Income Tax Officer, Masulipatam Circle. Gangayya was the manager of the undivided family and the assessments were made on him as representative of the family.

3. For the assessment of the year 1932-33 (previous year Official year 1931-32) notice under Section 22 (2) of the Act was issued to J. Gangayya on 9th April, 1932. He filed return of income on 20th May 1932. Gangayya died on 15th July 1932 before assessment could be made on him, leaving his son J. Kesava Rao, the petitioner, as the sole surviving member. After the death of his father, the petitioner continued to carry on the money-lending business which had been carried on by his father as the manager of the Hindu undivided family. Notices under Sections 22 (4) and 23 (2) of the Act were therefore issued to the petitioner on 7th December 1932 for the production of accounts, documents, etc. The petitioner complied with the notices and was assessed finally to income tax on the total and taxable income of Rs. 50,550. The Income Tax Officer did not levy super tax on the excess over Rs. 30,000 of the total income on the mistaken assumption that the petitioner, like his father, represented a Hindu undivided family.

4. The petitioner appealed to the Assistant Commissioner objecting to the amount of the assessment on various grounds which are not relevant for the purposes of this reference. In the course of the appeal proceedings the Assistant Commissioner learnt that the petitioner had no children and that he did not represent any Hindu undivided family. The Assistant Commissioner therefore considered that the petitioner should have been assessed to super-tax as an 'individual' on the excess over Rs. 30,000 of the total income. Accordingly he issued a notice to the petitioner, as required by the proviso to Section 31 (3) proposing to levy supertax on the basis that the petitioner was an individual. The petitioner objected and contended that he was a Hindu undivided family and continued as such and should therefore be treated as such. In the course of the argument before the Assistant Commissioner the petitioner urged that he and his wife constituted the Hindu undivided family. The Assistant Commissioner overruled this contention for the reasons stated in his order, an extract from which was filed as Exhibit A in O. P. No. 269/33, on the file of the High Court referred to below.

5. The petitioner then applied to my predecessor for a reference to the High Court on the 5 questions, (*a*) (*b*) (*c*) (*d*) and (*e*) mentioned in paragraph 5 of his petition alleged to be questions of law arising out of the Assistant Commissioner's order. My

predecessor held that there was only one question of law arising out of the Assistant Commissioner's order and that was whether the petitioner and his wife constituted a Hindu undivided family so as to be exempt from supertax in respect of income not exceeding Rs. 75,000. This was the point raised in questions (*b*) and (*c*) of the petition. He accordingly made a reference on this question (O. P. No. 269/33). The High Court made no order on this reference as it was not pressed. As regards the other questions (*a*), (*d*) and (*e*) raised in the application for reference, my predecessor declined to state a case on the ground that no question of law arose. A copy of his order is filed, marked Exhibit A.

6. On the petitioner's application to the High Court under Section 66 (3) for an order directing me to state a case, the High Court has, by its order dated 6th December, 1934, directed me to refer the following question:

"In the circumstances of this case, is the petitioner herein liable to be assessed under Section 26 (2) of the Indian Income-tax Act (XI of 1922)".

The question in this form was not raised either before the Assistant Commissioner or my predecessor.

7. Sub-section (2) of Section 26 reads as follows: "Where at the time of making an assessment under Section 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year".

That there can be a succession within the meaning of this sub-section by operation of law (inheriting a business, profession or vocation) as well as by act of parties (transfer *inter vivos* of a business, profession or vocation) has been laid down in *Maharajadhiraja of Darbhanga* v. *Commissioner of Income Tax, Bihar and Orissa*. The petitioner's contention appears to be that he having got the entire business by survivorship under Hindu Law, his case would not fall under Section 26 (2). In other words, there cannot be a succession by a person to something of which he was in part the owner already. I am not aware of any authority for this principle. It appears to me that the petitioner, considered as an individual, (which he now unquestionably is), is a person distinct from the undivided family of which, before the death of his father, he was a member and therefore that the terms of the section, which require succession by one person to another, are satisfied. I am fortified in this view by the judgment of this Court in the case of *V. R. S. A. R. Arunachalam Chettiar* v. *Commissioner of Income-tax, Madras* (3 I. T. C. 441 at page 448,) in which it was held that "in cases where there has been a partition of an undivided Hindu trading family Section 26 applies". In

this case, although there has been no partition, the essential facts are the same, *viz.*, that a business, formerly the property of a Hindu undivided family, has become the property of one of its members. I am of the opinion that the Hindu undivided family (consisting of the petitioner and his father) which originally carried on the business was succeeded in such capacity by the petitioner within the meaning of Section 26 (2) and that the question should be answered accordingly."

This petition was heard on the 19th day of September and having stood over for consideration, the Court delivered the following :—

JUDGMENT.

MADHAVAN NAIR, OFFG., C. J.—The question referred to us is. 'In the circumstances of this case is the petitioner herein liable to be assessed under Section 26 (2) of the Indian Income Tax Act?'

The circumstances are these: The petitioner, J. Kesava Rao, and his deceased father J. Gangayya constituted a Hindu undivided family deriving income from money-lending business. Gangayya was the manager of the family and the assessments used to be levied on him as representative of the family. For the assessment of the year 1932—33 (accounting year 1931—32) notice was issued to Gangayya under Section 22 (2) of the Income Tax Act on the 9th April, 1932, and he filed his return on the 20th May, 1932 showing a net income of Rs. 12,755. Gangayya died on the 15th July, 1932, before assessment could be levied on him. After his death the petitioner continued to carry on the business. Notices were then issued to him under Sections 22 (4) and 23 (2) of the Act. He complied with these notices and was finally assessed to income tax on a total taxable income of Rs. 50,550. The Income Tax Officer did not levy on him super tax on the excess over Rs. 30,000 of the total income on the assumption that the petitioner like his father represented a Hindu undivided family.

The petitioner appealed to the Assistant Commissioner objecting to the amount of the assessment. In the course of the appeal he learnt that the petitioner had no children or brothers. In the circumstances he considered that the assessment should have been made on the petitioner as an individual and not as a Hindu undivided family, since in his opinion after the death of the petitioner's father in July, 1932, the Hindu undivided family ceased to exist and the petitioner became the sole surviving member of the original Hindu undivided family. He therefore issued a notice to the petitioner under Section 31 (3) proposing to treat him as an individual and levy super tax accordingly. The petitioner contended that himself and his wife constituted a Hindu undivided family and that therefore the assessment made on him as a Hindu undivided family was correct. The objection was overruled and the supertax was levied

accordingly. The question arising for decision is whether in these circumstances the petitioner is liable to be assessed under Section 26 (2) of the Indian Income Tax Act.

Sub-Section 2 of Section 26 of the Income Tax Act is as follows: ' Where, at the time of making an assessment under Section 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year."

In support of his contention that he is not liable to assessment under the above section the petitioner urges two points. In the first place he contends that inasmuch as he got the entire business by survivorship under Hindu Law he cannot be said to have 'succeeded' to the business within the meaning of that term as used in the section. In other words, he argues that there cannot be a succession by a person to something of which he was in part the owner already. His next contention is that for the application of the section a person carrying on any business, profession or vocation should be succeeded in such capacity by another person, that he alone or he and his wife would constitute a Hindu undivided family just as he and his father constituted one before that, the Hindu undivided family remaining the same both before and after the death of his father, the terms of the section are not satisfied and that therefore he is not liable to be assessed under it. If either of these points is decided in his favour he would succeed in the reference.

The counsel for the Commissioner meets the above points by saying that the petitioner, considered as an individual which he now unquestionably is, is a person distinct from the undivided Hindu family of which before the death of his father he was a member, that he cannot by himself alone or even with his wife constitute a joint Hindu family, that he has succeeded to the business in the sense in which the terms 'succeeded' is ordinarily understood and that he is therefore liable to be assessed under Section 26 (2).

Both the questions raised are not free from difficulty. Section 26 (2) has not been very happily worded. The term "the person carrying on any business, profession or vocation has been succeeded in such capacity by another person" may well suggest that what is contemplated is merely succession in the management of business by another person, but obviously that cannot have been the intention of the Legislature. It appears to us that the word 'succession' as used in the section connotes a transfer of ownership and the person who succeeds another must have by such succession become the owner of the business which his predecessor was carrying on and which he after the succession carries on in such capacity, that is, the capacity as owner. If this view is correct, as we think it is

then it seems fairly clear that the undivided Hindu family which was carrying on business has not been 'succeeded' in such capacity by the petitioner as the petitioner was himself in part the owner of the property already and as such there has been no transfer of ownership in the business as he has become entitled to it by survivorship. No authority relevant for deciding the point has been cited by either side. The decision relied on by the Commissioner in *V. R. S. A. R. Arunachalam Chettiar* v. *Commissioner of Income-Tax, Madras* in which it was held that in cases where there has been a partition of an undivided Hindu trading family, Section 26 applies, does not help him, for those are not cases where one party gets the property of another by survivorship. It would therefore follow that the petitioner has not 'succeeded' to the business of his father within the meaning of Section 26 (2) of the Act and is not therefore liable to be assessed under that section.

In the above view it is not necessary to decide the point whether the petitioner himself, or with his wife, does not constitute an undivided Hindu family—the second point raised in the case. However, as the point was argued for some time we will briefly refer to the arguments. The petitioner's counsel is prepared to argue that the petitioner by himself would constitute an undivided Hindu family; but in the present case he contends it is not necessary for him to go so far as the petitioner has his wife living and they together, he argues, would certainly come within the description of an undivided Hindu family. This argument is not without force, and would seem to have some authority to support it. Strictly speaking, it is not difficult to conceive of the petitioner singly as a member of an undivided Hindu family; that he was a member of an undivided family when his father was living cannot be disputed; that family has never been divided and the petitioner though he is the only one living now may well be said to represent in his person the undivided Hindu family. But it is not necessary to pursue this line of thought as, already stated, the petitioner has his wife living, and do they not taken together constitute an undivided Hindu family? If a son is born to them there cannot be any doubt that there would come an undivided Hindu family in existence and so it is said that potentially there is an undivided family now in existence. On the other hand, it is urged that when the original undivided family is reduced to a single member the property of the family loses its character of joint family property and the sole remaining member is reduced to the position of an individual owning those properties; and that his wife does not in any manner form a member of an undivided Hindu family. It is argued that the wife or widow of a co-parcener has only a right of maintenance and has no substantial rights to the property of the family. This argument assumes that the term 'undivided Hindu family' should be limited to a family of co-parceners. The petitioner's contention seems to be supported by an observation of RAMESAM, J., in *Vedathanni* v. *Commissioner of Income Tax, Madras*. In that case the first question referred to

the High Court was whether the maintenance and arrears of maintenance received by a widow of a member of a joint undivided Hindu family is not exempt from taxation under Section 14 (1) and other sections of the Act. In deciding that point the learned Judge expressed the view that the contention that even where the family is reduced to a single male member there is still a joint family, at any rate where there are a number of widows and other persons entitled to maintenance, is not untenable. This question did not directly arise for decision before the learned Judge. After the arguments were over Mr. Sastri on behalf of the Income Tax Commissioner brought to our notice a judgment of the Calcutta High Court in the *Income Tax Reports*, Vol. III at page 123, which seems to support the view that he has been contending for, namely, that the undivided Hindu family contemplated in the Income Tax Act is an undivided Hindu co-parcenery. In the present case it is not necessary to decide which of the above contentions should be accepted, as we have decided the first point raised by the petitioner in his favour and that is enough to dispose of the case.

We should accordingly answer that in the circumstances of this case the petitioner is not liable to be assessed under Section 26 (2) of the Indian Income Tax Act. He is entitled to his costs of Rs. 250 and the refund of Rs. 100 deposited by him.

STONE, J.—I agree.

KING, J.—I agree.

Reference answered accordingly

[IN THE MADRAS HIGH COURT.]

L. C. T. S. P. SUBRAMANYAM CHETTIAR

v.

COMMISSIONER OF INCOME TAX, MADRAS.

Madhavan Nair, Offg, C.J., Stone and King, JJ.

September 18, 1935.

INCOME TAX—FOREIGN REMITTANCE—DISCHARGE OF BRITISH INDIAN DEBT BY HUNDI DRAWN ON ASSESSEE'S BUSINESS OUTSIDE BRITISH INDIA—CONSTRUCTIVE REMITTANCE—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 4.

The assessee carried on business at Tinnevelly in British India and at Penang, outside British India. To discharge a debt of the Tinnevelly shop he issued two hundies *on his Penang shop and the Penang shop paid the amount to the creditor at Penang. The transactions were recorded in the Penang folio of the Tinnevelly books and the Tinnevelly folio of the Penang books. The profits at Penang were also sufficient to cover the payment*:

Held, *on a reference by the Commissioner of Income Tax, that the sum of money so paid at Penang should be treated as a remittance of foreign profits to British India and was assessable to income tax under Section 4 of the Indian Income Tax Act as income received by the assessee within British India.*

HALL *v.* MARIANS (18 Tax Cases 148) *distinguished.*

Case stated by the Commissioner of Income Tax, Madras, under Section 66 (3) of the Indian Income Tax Act (XI of 1922). O. P. No. 8 of 1935.

P. R. Srinivasan, for the assessee.

Patanjali Sastri for the Commissioner.

In accordance with the High Court's order the Commissioner of Income Tax, Madras referred the following case for the decision of the Hon'ble the Judges of the High Court under Section 66 (3) of the Indian Income Tax Act, XI of 1922 (hereinafter referred to as the Act).

"2. The petitioner is the manager of a Hindu undivided family residing at Kandanur in the Ramnad District. He carries on money lending business at Tinnevelly (his principal place of business) and at Penang, Straits Settlements. He is also a partner in two money lending firms, the L. Rm. Ct. Firm, Rangoon and the L. Rm. Ct. Firm, Thonze carrying on business in Burma.

3. The reference arises out of the inclusion in the additional assessment made upon the petitioner for the year 1932-33, previous year, Tamil year *Prajothpathi*, (13—4—1931 to 12—4—1932)

of a sum of Rs. 13,730-11-5 being the amount paid by the petitioner's Penang shop in respect of 2 hundies drawn by him. The facts relating to this are as follows:

In or about July 1931, the trustee of the M. N. S. A. Rm. Patasala, a school conducted at Kunnakudi in British India very near the petitioner's Tinnevelly shop, deposited Rs. 13,523 with the petitioner's shop at Tinnevelly. This was credited in the Tinnevelly ledger to an account styled "Box *pathu* (Dr.) *varavu* (Cr) account". This money was retained in Tinnevelly and was utilised for the Tinnevelly business. A few months later, in October 1931, the trustee wanted the money back. Instead of giving him cash the petitioner gave him two hundies for Rs. 13,592-15-3 being the amount due to the trustee (including interest) and thus discharged the debt due to the trustee. The hundies were drawn by the petitioner on his Penang shop in favour of the trustee of the Patasala. The trustee sent these hundies to a banker K. Al. Rm. Penang, for collection. The petitioner's Penang shop paid the amount covered by these hundies to K. Al. Rm. on 23rd Purattasi, Prajothpathi (October 1931). The amount paid including interest from the date of the hundi till the date of payment less discount was Rs. 13,730-13-6. This was debited to the "Box Account" in the Tinnevelly ledger mentioned above on 17th Arpasi, Prajothpathi November 1931 and that account was closed.

The petitioner's ledger of the Tinnevelly shop contains a folio headed "Penang L. Ct. Sp." wherein the amounts received by the Tinnevelly shop from Penang are credited and the amounts sent by the Tinnvelley shop to Penang are debited. When the petitioner's "Box Account" in Tinnevelly was debited with Rs. 13,730-13-6 (amount covered by the 2 hundies) on 17th Arpasi Prajothpathi, a corresponding credit was made in the "Penang L. Ct. Sp." folio along with another sum of Rs. 25,000/- also received, by means of hundies from Penang. Two months later *i.e.*, towards the close of the year of account, the petitioner transferred to Penang an equivalent sum out of the collections of his business in Rangoon and the account was balanced. In the Penang books there is a folio corresponding to the one in the Tinnevelly books. The amounts covered by the hundies were shown in this folio as remittances made to Tinnevelly and amounts transferred from Rangoon were shown as receipts from Tinnevelly. This account was also balanced at the end of the year like the corresponding one in the Tinnevelly ledger.

The petitioner did not dispute before the Income Tax Officer that the profits in Penang were sufficient to cover the remittances. The Income Tax Officer therefore held that the amount of the two hundies, Rs. 13,730-13-6 and the sum of Rs. 25,000/- mentioned above came out of the profits of the Penang firm and assessed them accordingly.

4. The petitioner appealed to the Assistant Commissioner and contended (1) that the remittances from Penang had been made

in the course of current dealings between the petitioner's business at Penang and Tinnevely, (2) that therefore they must be regarded as having been sent from capital, (3) that there were no profits out of which the remittances could be made, (4) that the fact that the amount was used for businesss purposes and was returned in the same year indicated that the petitioner had no intention to draw profits and (5) that the sum of Rs. 13,831, was not a remittance out of profit according to the decision in *Multanchand Johurmual* v. *Commissioner of Income Tax, Bengal* (5 I. T. C. 154).

The Assistant Commissioner found that the profits available for remittance exceeded $ 1,00,000, that the amounts paid by Penang on behalf of Tinnevelly were not identifiable with petitioner's capital in Penang and that therefore they were rightly presumed to have come out of profits. In regard to Rs. 13,731, the amount covered by the two hundies, he found that there was a constructive receipt in British India. He therefore confirmed the assessment and dismissed the appeal. An extract of his order is filed, marked Exhibit A.

5. The petitioner then filed an application under Section 66 (3) of the Act and requested me to state a case and refer 3 questions alleged to be questions of law, arising out of the Assistant Commissioner's order. The points raised in questions (2) and (3) were in regard to the assessment of Rs. 13,730 and Rs. 25,000 mentioned above. I declined to state a case on the ground that no question of law arose. An extract of my order is filed, marked Exhibit B.

6. The petitioner then moved the High Court under Section 66 (3) of the Act to direct me to refer 3 questions marked (*a*), (*b*) and (*c*) in the petition and the High Court has by its order dated 18th March, 1935 directed me to state a case and refer one of the 3 questions which is as follows :—

"*Question* (*c*). Whether the sum of rupees thirteen thousand seven hundred and thirty (Rs. 13,730) paid by the Penang firm at Penang to a creditor of the Tinnevelly firm can be treated as a remittance of foreign profits in British India?"

No question in this form was framed in the application addressed to me under Section 66 (2).

7. The point for decision appears to be whether the amount in question was received in British India in the year of account. The petitioner contends that it was not so received; and I understand that in so contending he relies upon the decision printed at 18 Tax Cases p. 148 (*Hall* v. *Marians*). That was a case in which a lady who had overdrawn her account with the National Bank of India in London arranged to have the overdraft transferred to the Colombo branch of the same Bank where it was discharged. The facts in this case are not similar. The petitioner's indebtedness to the Patasala was not transferred to Penang. He discharged that indebtedness in British India by the issue of a

hundi drawn on his Penang shop. The issue of this hundi, which was a negotiable instrument, is what distinguishes this case from the case cited. What the petitioner did was to utilise *in British India* monies available to him in Penang; and his doing so to my mind implies a constructive receipt of those monies in British India. If that is right, the fact that money was sent two months later from Rangoon to Penang is irrelevant. The Penang shop has sufficient profits and there is no evidence to show that the money paid by the Penang shop for the hundies was capital. I am therefore of opinion that the sum in question should be treated as a remittance of foreign profits to British India in the year of account."

This petition coming on for hearing the Court delivered the following:

JUDGMENT.

MADHAVAN NAIR, J.—The question referred to us is whether the sum of Rs. 13,730 paid by the Penang Firm at Penang to a creditor of the Tinnevelly Firm can be treated as a remittance of foreign profits in British India.

The question arises with reference to the inclusion in the additional assessment made upon the petitioner for the year 1932-33 (previous year 13—4—31 to 12—4—32) of this sum which is the amount paid by the petitioner's Penang shop in respect of two hundies drawn by him in the following circumstances. In or about July 1931 the trustee of a *patasala* at Kunnakudi deposited certain monies with the Tinnevelly shop of the assessee. The trustee carries on money-lending business outside India at Penang, Rangoon and Thonze. When he applied for repayment of the money the petitioner issued two hundies on his Penang shop for the amount due with interest, namely, Rs. 13,730. The Penang shop paid these amounts on 9—10—1931.

The transactions relating to the discharge of the debt and the payments were recorded in the Penang folio of the Tinnevelly books and in the Tinnevelly folio of the Penang books as mentioned in the reference. The petitioner did not dispute before the Income Tax Officer that the profits in Penang were sufficient to cover the remittances.

The point for determination is whether the amount in question was received in British India in the year of account within the meaning of Section 4 (2) of the Income Tax Act. The petitioner contends that it was not so received relying on the authority of the decision in *Hall* v. *Marians* (18 Tax Cases 148). That case is clearly distinguishable. In that case a lady who had overdrawn her account in the National Bank of India in London instructed that Bank to transfer the loan to her current account with its Colombo branch and this was carried out by cross entries in the books of the two offices. A small credit balance in Colombo was thereupon converted into a debit balance and a few weeks afterwards the

overdraft and the interest accrued thereon were discharged out of the proceeds of the sale in Colombo of certain Indian bonds held by her. It was held that the proceeds of the sale of bonds had not been received in the United Kingdom within the meaning of Rule 2 of Case V. On the facts the present case is altogether different from this case. The petitioner's indebtedness to the trustee of the *patasala* was not transferred to Penang as it was in the English case. What happened here was that the indebtedness in British India was discharged by the issue of a hundi drawn on the Penang shop. Discharge of a debt by issuing hundies is well-known in commercial circles as the discharge of a debt. In the circumstances of the case the debt remained an Indian debt and it was discharged by the issue of a hundi in India. What the petitioner did was to use in British India monies available to him in Penang and this, in our opinion, amounts to a receipt in India by the assessee of his gains outside British India. It was argued that it must be understood that the parties had agreed to have the debts discharged out of India and that therefore there was no constructive receipt of the monies in question in India. The idea of a special arrangement between the parties should be excluded because of the fact that a hundi was issued in India in discharge of the debt.

I was then argued that in order to come within the meaning of the term 'received' as used in Section 4 of the Income Tax Act there must be an actual transfer of the money in question and the receipt of the sum in India. No authority in support of that contention has been cited to us. The decision in 8 Indian Tax Cases 103, having regard to the facts of the case, does not support this contention.

We would therefore hold that the sum of Rs. 13,730 mentioned in the reference should be treated as a remittance of foreign profits in British India. We answer the question accordingly. The Commissioner will get Rs. 250 for costs from the assessee.

STONE, J.—I agree.
KING, J.—I agree.

Reference answered accordingly.

[IN THE MADRAS HIGH COURT.]

GENERAL CORPORATION LTD.

v.

COMMISSIONER OF INCOME TAX, MADRAS.

Madhavan Nair, Offg. C. J., Stone and King, JJ.

September 17, 1935.

INCOME TAX—BUSINESS EXPENDITURE—EXPENDITURE INCURRED WITH A VIEW TO RESUME BUSINESS WHICH HAS CEASED TO WORK—WHETHER ALLOWABLE DEDUCTION AGAINST PROFITS

FROM OTHER BUSINESS—'CARRYING ON BUSINESS'—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 10 (2) (ix) AND 24.

A company was formed for the purpose, inter alia, *of searching for, winning, working and getting mica. In November, 1927 the production of mica was stopped owing to a cyclone. With a view to resume the production the company did some prospecting work in the year of account (1928—1929) keeping a reduced staff and incurred an expense of Rs. 5,420 by way of salary, wages, legal expenses, depreciation etc. The income tax authorities refused to deduct this amount from the profits of the company's other business on the ground that, as the business of mining mica was stopped in 1927 and not resumed, the expenditure incurred was of a capital nature and not one incurred in the carrying on of a business :* Held, *that having regard to the circumstances of the present case, the expenditure incurred by the company was incurred in the carrying on of the mica business, and was allowable as a deduction against the profits and gains of the assessees' other business, even though there was a period of inactivity in the carrying on of the business and the business was not in fact resumed after the expenses had been incurred.*

The question whether the business was being carried on must depend in each case on its own facts and not on any general theory of law.

MAHALAKSHMI TEXTILE MILLS LTD., *In re* [1932] (6 I. T. C. 83) *distinguished.*

Case stated by the Commissioner of Income Tax, Madras under Section 66 (3) of the Indian Income Tax Act.

In accordance with the High Court's order dated December 3, 1931, the Commissioner of Income Tax, Madras, referred the following case for the decision of the Hon'ble the Judges of the High Court under Section 66 (3) of the Indian Income Tax Act, 1922 :—

"2. The petitioner is a company (hereinafter called the company) incorporated under the Indian Companies Act. It carried on business in motor accessories at Madras, Bombay, Coimbatore and Ootacamund and in mica mining at Nellore. The mining business at Nellore was started in November, 1926. The mines were worked till November, 1927 when this business was stopped on account of a cyclone. Till 1930-31 the company was assessed by the Income Tax Officer, Bombay, as Bombay was its principle place of business; but in 1930-31, the principal place of business was changed to Madras. The case was therefore transferred to the file of the Income Tax Officer, II Circle, Madras and thereafter the company is being assessed by that officer. The business in motor accessories was handed over to another company, the Champion Automobiles

Limited, Madras, in 1933-34 and this company is now only a shareholder in the Champion Automobiles Limited and is not conducting any other business of its own.

3. The question under reference arises out of the assessment of the year 1929-30 (previous year, official year 1928-29). This assessment was originally made by the Income Tax Officer, Bombay, on a total income computed at Rs. 11,187. In arriving at this figure he allowed Rs. 5,420 being the loss from the mica mining at Nellore, against the profits from the Company's other business. This loss was entirely made up of expenses on account of salary and wages, depreciation, legal expenditure etc. There was no credit entry representing receipts. A copy of the profit and loss account is filed, marked Exhibit A. The Income Tax Officer, II Circle, Madras, to whom the file had been transferred for the assessment of the year 1930-31, considered that there had been an under-assessment in the year 1929-30. He therefore took action under Section 34 of the Act and assessed the company on a total income computed at Rs. 18,932. He disallowed among other things, Rs. 5,420 (the loss of the mining business at Nellore) on the ground that the loss was a capital nature and not a loss incurred in the regular course of business as the company had not done any mining business in the year of account.

4. In appealing to the Assistant Commissioner, the company did not deny that the mica mining business had stopped in November, 1927, but alleged that after that date some prospecting had been done, with a view to a possible future resumption of the business. The Assistant Commissioner held that the expenditure incurred in prospecting for mica was of a capital nature. He therefore confirmed the Income Tax Officer's finding but on other grounds reduced the assessment to Rs. 15,782. A copy of his order is filed marked Exhibit B.

5. The company then filed an application before me under Section 66 (2) of the Act and required me to state a case and refer the following questions for the decision of the High Court.

"Whether the sum of Rs. 5,420 shown under the head "Nellore loss" and referred to in the profit and loss statement of the applicants is a capital expenditure or whether the same represents establishment and office contingencies actually incurred by the applicants and is therefore exempt from tax."

I declined to a state case on the ground that no question of law arose. A copy of my order is filed, marked Exhibit C.

6. The company thereupon moved the High Court under Section 66 (3) of the Act and in its order dated 23rd April, 1934, the High Court called for a finding on the following points, *viz.*,

"With what intention the assessee company incurred the expenses during the year of assessment?"

My finding was that the company intended to resume the business of mica mining if conditions and prospects proved favourable and that the expenditure had been incurred with that intention. A copy of my finding is filed, marked Exhibit D.

7. With reference to the above finding the High Court in its order dated 3rd December 1934 has now directed me to state a case and refer the following question:—

" Where an assessee carrying on a mica business is obliged to stop it on account of a cyclone but still incurs expenditure during the year of account with the intention of resuming the same if conditions and prospects proved favourable but the business in fact was never resumed, is the expenditure so incurred allowable as a deduction against the profits and gains of the assessee's other business "

The question framed is different from the one propounded by the company in its application dated 26th February, 1932.

8. Presumably it is not suggested that the expenditure incurred in connection with the mica mining business can, as such, be brought into the computation of the profits and gains of the other business. I take it therefore that the question propounded is whether on the facts of this case, a loss was sustained in the mica business in the year ending March 31, 1929, which could be set off against the profits and gains of the other business.

9. Tax is payable by an assessee under the head 'business' " in respect of the profits and gains of any business carried on by him ": (Section 10). Similarly a loss under this head, to be allowable, must result from carrying on a business. The finding in this case is that the mica mining business was not carried on in the year ending March 31, 1929. The question framed seems therefore to reduce itself further to a question whether that finding is correct.

10. The facts on which I rely are that the business was stopped in November 1927 and was not resumed. There is a further fact, *viz.*, that the company intended, at some future date to start the business again, if that should seem likely to prove a profitable undertaking. But a person not actually carrying on a business cannot be said to derive present profit or loss either from a business that he carried on in the past or from a business that he contemplates carrying on in the future. I submit, therefore, that the finding is correct and that the question should be answered in the negative.

11. The case appears to be governed by the decision of this Court in the case of the *Mahalakshmi Textile Mills Ltd.* v. *Commissioner of Income Tax, Madras.* The fact that in that case the

business which the company intended to start was a new one, whereas in the present case the intention was to restart an old business, does not make any difference so far as the principle is concerned."

JUDGMENT.

MADHAVAN NAIR, J.—The question referred to us by the Income Tax Commissioner is:

"Where an assessee carrying on a mica business is obliged to stop it on account of a cyclone but still incurs expenditure during the year of account with the intention of resuming the same if conditions and prospects proved favourable, but the business in fact was never resumed, is the expenditure so incurred allowable as a deduction against the profits and gains of the assessee's other business?"

The facts are these: The assessee is a company incorporated under the Indian Companies Act. The company carried on business in motor accessories at Madras, Bombay, Coimbatore and Ootacamund, and in mica mine at Nellore In this reference before us we are concerned with a sum of Rs. 5,420 which the company claims it is entitled to deduct for expenses incurred in carrying on the mica business. The mining business was started at Nellore in 1926. It was worked till November 1927 when the production was stopped on account of a cyclone. With a view to resume the production the company did some prospecting work and incurred an expenditure of Rs. 5,420 in 1928-29. The amount was made up of the expenses on account of salary, wages, legal expenses, depreciation, etc. It may be mentioned here that production was not resumed by the company. Till 1930-31 the company was assessed to income tax by the Income Tax Officer of Bombay as it had its principal place of business at Bombay. In that year the principal place of business was changed to Madras and the duty of assessing the company to income tax for 1930-31 fell to the Income Tax Officer in Madras. In 1928-29 the Bombay Income Tax Officer allowed the sum of Rs. 5,420 being the loss of the mica business at Nellore against the profits of the company's other business. When the assessment for the year 1930-31 was taken up the Madras Income Tax Officer took action under Section 34 of the Income Tax Act and assessed the company for a total income of Rs. 18,932 disallowing the sum of Rs. 5,420 on the ground that the loss was of a capital nature and not loss incurred in the course of business as the company did not do any business in the year of account. This order was confirmed by the Assistant Commissioner.

On the previous occasion when this Court was moved under Section 66 (3) of the Income Tax Act, a finding was called for on the point with what intention the assessee company incurred the expenses during the year of assessment? The finding returned was that 'the company intended to resume the business of the mica mining if conditions and prospects proved favourable and that the expenditure had been incurred with that intention'. After the

receipt of this finding this Court directed the Commissioner to refer the point stated at the beginning of this judgment.

The question for decision is whether the assessee in the circumstances of the case may be said to have been carrying on the business of the mica mining, during the year in question, for it is clear that the loss to be allowable must result from the carrying on of a business (Section 10). It is argued on behalf of the Commissioner that the mica mining business originally carried on by the company as one of its businesses came to an end in 1927, that it was not resumed at all, and that in the circumstances the expenses incurred with a view to resume the business must be considered to be loss of a capital nature incurred by the company and not a loss incurred in the course of business as the company had admittedly not done any business in 1928-29. In our opinion this argument cannot be accepted. According to its memorandum one of the objects of the company was to search for, win, work and get mica. When production was stopped by a cyclone, the company started prospecting to find out whether the business can be carried on, and incurred, the expenses in question, with a view to resume production. How can it then be said that the business had stopped? It is admitted that the old staff of the company doing the mica business was maintained by it on a reduced scale, the work of prospecting was done by that staff, and that the expenses were incurred in trying to see whether the production can be resumed. It appears to us that the fact that there was some period of inactivity in the carrying on of the business does not really affect the question, nor is the question affected by the consideration that the business was not resumed after the expenses had been incurred. The case relied on, *Mahalakshmi Textile Mills Ltd., In re* (6 I. T. C. 83) in the Commissioner's reference is not to the point, for in that case, the company started a new business altogether. Expenses incurred in connection with the re-starting of an old business as in the present case though it was not resumed afterwards, should be treated on a different footing. It is not necessary to discuss the various illustrative cases brought to our notice as the decision whether the business was being carried on must depend in each case on its own facts and not on any general theory of law. Having regard to the circumstances of the present case we think the expenditure incurred by the company in 1928-29 was with respect to the carrying on of the mica business which it carried on along with its other business and the amount is therefore allowable as a deduction against the profits and gains of the assessee's other business. We answer the question accordingly. The assessee will get Rs. 250 for his costs and he will also get refund of the Rs. 100 deposited by him.

STONE, J.—I agree.

KING, J.—I agree. *Reference answered accordingly.*

[In The Oudh Chief Court.]

COMMISSIONER OF INCOME TAX, C.P. AND U.P.

v.

LAL SURESH SINGH.

Srivastava and Zai-ul-Hasan, JJ.

September 17, 1935.

Impartible Estate—Allowance Paid to Junior Member—Whether 'Agricultural Income'—Income Tax Act (XI of 1922), Sections 2 (1), and 4 (3) (viii).

Where the holder of an impartible estate agreed to pay a certain monthly allowance to his younger brother, and his heirs for their maintenance out of the income of the estate, in consideration of the latter giving up all claims to any share in the estate, and this allowance had further been made a charge on the estate:

Held, *that the maintenance allowance so paid out of the income of the estate was not "agricultural income" within the meaning of the Income Tax Act.*

Cases referred to:

Maharaj Kumar Gopal Saran Narain Singh *v.* Commissioner of Income Tax, Bihar & Orissa [1935] (1935 I.T.R. 237; 156 I.C. 856; A.I.R. 1935 P.C. 143; I.L.R. 14 Pat. 552).

Saltanat Begum, *In re* [1933] (1933 I.T.R. 379; 146 I.C. 651; A.I.R. 1933 Oudh 475.)

References (No. 1 of 1934 and No. 3 of 1935) made by the Commissioner of Income Tax, U.P. & C.P.

H. S. Gupta, Government Advocate, for the Commissioner of Income Tax.

Hyder Hussain, for the opposite party.

Judgment:—These are references by the Commissioner of Income Tax, U.P. and C.P., in the matter of assessment in the case of Lal Suresh Singh of Kalakankar.

The material facts of the case are that on October 7, 1929, two reciprocal deeds of agreement were executed, one by Lal Suresh Singh in favour of his elder brother Raja Avadhesh Singh of Kalakankar and the other by Raja Avadhesh Singh in favour of Lal Suresh Singh. The substance of these agreements is that Lal Suresh Singh gave up all claims to any share in the Kalakankar estate, and in consideration thereof Raja Avadesh Singh agreed to pay Lal Suresh Singh for his lifetime Rs. 600 monthly out of the profits of the estate. It may be mentioned that after the death of Lal Suresh Singh this amount was to be reduced to Rs. 300 monthly which was to be payable to his heirs. The income tax

authorities held that the annuity received by Lal Suresh Singh under the agreements above referred to constituted income which was assessable to income tax. Lal Suresh Singh on the other hand contended that it was exempt from assessment firstly, on the ground that he received it as a member of an undivided Hindu family and secondly, because it was agricultural income. The Commissioner of Income Tax has accordingly referred the following questions for the decision of this Court:

"In the circumstances of this case is the allowance exempt either

(*a*) as income received by the assessee as a member of a Hindu undivided family within the meaning of Section 14 (1), or

(*b*) as agricultural income with the in purview of Section 2 (1) read with Section 2 (3) (viii) of the Act?"

These references were put up before us on February 27, last. On that date Mr. Haidar Husain, Counsel for the assessee, stated that he did not press his plea for exemption from assessment on the ground of the assessee being a member of an undivided Hindu family within the meaning Section 14 (1). As regards the other plea based on the ground of the allowance being agricultural income, he pointed out that the identical question had been raised in an appeal preferred by Rani Saltanat Begam against the decision of a Bench of this Court. In the circumstances he asked that the decision of these references be deferred until the decision of the appeal of Saltanat Begam pending before their Lordships of the Judicial Committee. We acceded to this request. As the appeal preferred by Rani Saltanat Begam has now been withdrawn, the references have been put up again before us today for orders.

In view of the admission made by Mr. Haidar Husain the first question referred by the Commissioner of Income Tax does not arise.

As regards the second question, it was held by a Bench of this Court in the case of *In the matter of Saltanat Begum* that maintenance allowance paid to a widow out of the income of an estate cannot be said to be "agricultural income" within the meaning of the Income Tax Act and was not, therefore exempt from income tax under Section 4 (3) (vii) of the Act. The learned Judges who decided this case have reviewed the case law on the point. As we are in entire agreement with the view expressed in this case, it is not necessary for us to go over the same ground again and discuss the rulings referred to in that case. We would, however, add that in a recent case decided by their Lordships of the Judicial Committee on appeal from a decision of the Patna High Court in *Maharaj Kumar Gopal Saran Narain Singh* v. *Commissioner of Income Tax, Bihar and Orissa* the question was whether an annual sum payable to a person during his

life in part consideration of a transfer by him of agricultural land is not "agricultural income" within the meaning of the Income Tax Act. Their Lordships in this case observed as follows:—

"In their Lordships' opinion it is impossible to hold that this annual payment is 'agricultural income' within the meaning of the Act. It is not rent or revenue derived from land; it is money payable under a contract imposing a personal liability on the covenantor the discharge of which is secured by a charge on land. The covenantor is at liberty to make the payments out of any of her moneys and is bound to make them whether the land is sufficiently productive or not."

These remarks fully apply to the present case. Raja Avadhesh Singh under the above-mentioned agreements agreed to pay this allowance to his brother and it was made a charge on the whole of the Taluka Kalakankar. It cannot, in any sense, be regarded as rent or revenue derived from the land. It is only an allowance which the taluqdar agreed to pay to his younger brother and his heirs for their maintenance. Though the allowance was secured by a charge on the taluqa, yet the Raja is at liberty to make the payments out of any of his moneys. We have, therefore, no hesitation in holding that the allowance in question cannot be regarded as "agricultural income" within the purview of Section 2 (1) read with Section 4 (3) (vii) of the Income Tax Act.

We would therefore, answer question (b) in the negative, and leave question (a) unanswered.

The learned Government Advocate had to appear in support of these references on two hearings. Under Rule 12 of Appendix VII of the Rules of the Oudh Chief Court we direct that he should be paid Rs. 480 by the assessee for his fee for both the cases.

Reference answered in negative.

[IN THE ALLAHABAD HIGH COURT.]

COMMISSIONER OF INCOME TAX, U. P. & C. P.

v.

VIJAYANANDA GAJAPATHI RAJU.

Sulaiman, C. J., and Bennet, J.

January 10, 1935.

INCOME TAX—APPEAL TO PRIVY COUNCIL—APPEAL WHEN LIES—IMPARTIBLE ESTATE—ALLOWANCE RECEIVED BY JUNIOR MEMBER—WHETHER RECEIVED 'AS MEMBER OF UNDIVIDED HINDU FAMILY'—EXEMPTION—QUESTION OF GENERAL IMPORTANCE—INCOME TAX ACT (XI OF 1922), SECTION 66-A (2) AND (3)

The right of appeal to His Majesty in Council in income tax cases is confined to such cases as are certified to be fit for appeal by the High Court. Sub-Section (3) of Section 66-A of the Income Tax Act only means that the procedure to be applied to appeals, where an appeal lies, shall be that which is laid down in the Civil Procedure Code.

Where the question to be decided was whether maintenance allowance received by the junior member of an impartible estate from the holder of the estate under certain deeds executed in his favour was received by the junior member "as a member of an Hindu undivided family" the High Court held, *that the question was one of general importance requiring an authoritative pronouncement and granted leave to appeal to the Privy Council.*

Cases referred to :—

BAIJNATH PRASAD SINGH *v.* TEJ BALI SINGH [1921] (43 All. 228; 60 Ind. Cas. 534; A.I.R. 1921 P.C. 62; 48 I.A. 195).

COMMISSIONER OF INCOME TAX, MADRAS *v.* NARAYANA GAJAPATHI [1934] (57 Mad. 1903; 151 Ind. Cas. 926; A.I.R. 1934 Mad. 608; 67 M.L.J. 306; 1934 I.T.R. 288).

KONNAMMAL *v.* ANNADANA JADAYA GOUNDER [1928] (51 Mad. 189; 108 Ind. Cas. 354; 55 I.A. 114; A. I. R. 1928 P. C. 68).

KRISHAN KISHORE *v.* COMMISSIONER ON INCOME TAX [1933] (14 Lah. 225; 141 Ind. Cas. 415; A. I. R. 1933 Lah. 284; 1933 I. T. R. 143).

RAMA RAO *v.* RAJA OF PITTAPUR [1918] (41 Mad. 778; 47 Ind. Cas. 354; A. I. R. 1918 P. C. 81; 45 I. A. 148).

RAJA YARLAGADDA MALLIGARJUNA PRASADA NAIDU *v.* YARLAGADDA DURGA PRASADA NAIDU (24 Mad. 147; 27 I. A. 151).

SHIBA PRASAD SINGH *v.* PRAYAG KUMARI DEBEE [1932] (59 Cal. 1399; 138 Ind. Cas. 861; A. I. R. 1932 P. C. 216; 59 I. A. 331).

Application for leave to appeal to His Majesty in Privy Council. [P. C. A. No. 14 of 1934].

K. Varma, for the Commissioner.

Tej Bahadur Sapru and *Ajudhiya Nath*, for the assessee.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council in an income tax matter. The value of the subject-matter in dispute is well over Rs. 10,000 and the opinion of the Income Tax Commissioner has not been accepted by the High Court on reference made to it. The learned Advocate for the Income Tax Commissioner contends before us that he is, as of right, entitled

to appeal to His Majesty in Council under Section 66-A, sub-Section (3), Income Tax Act, XI of 1922. In our opinion this contention is not well-founded. The right of appeal is conferred only by sub-Section (2) which provides that an appeal shall lie to His Majesty in Council in any case which the High Court certifies to be a fit one for appeal. This sub-section does not go on to say, as is provided in Section 109 (*a*) and (*b*) that an appeal shall lie from any decree or final order passed by the High Court in the exercise of its final appellate or original civil jurisdiction. It follows that the right of appeal is confined only to such cases as are certified to be fit by the High Court.

Sub-section (3) is quite different and lays down that the provisions of the Act, relating to appeals shall apply in the case of appeals from decrees. That obviously deals with the procedure to be applied to appeals where such an appeal lies under the preceding sub-section (2). We accordingly hold that no appeal would lie unless the case can be certified as being fit for appeal to His Majesty in Council.

The assessee is a younger brother of the Maharaja of Vizianagram, who holds an impartible Raj. Under certain deeds a monthly allowance of Rs. 10,000 is paid by the Raja to the younger brother, and it is this monthly allowance which is sought to be taxed by the Income Tax Officer. Under Section 12, Income Tax Act, all incomes are taxable unless otherwise exempted. The assessee claims exemption under Section 14 (1), under which any sum which is received by a member of a Hindu undivided family is exempted. The question in this case therefore was whether this income is a sum received by the younger brother, "as a member of the Hindu undivided family." The Bench, differing from the view expressed by the Income Tax Officer came to the conclusion that the monthly allowance was such an income. This view has also been followed by the Madras High Court in *Commissioner of Income Tax, Madras* v. *Narayana Gajapathi*. A similar view has been recently expressed by the Lahore High Court in *Krishan Kishore* v. *Commissioner of Income Tax*. These cases have relied strongly on the observations of their Lordships of the Privy Council in *Raja Yarlagadda Mallikarjuna Prasada Naidu* v, *Yarlagadda Durga Prasada Naidu*, *Baijnath Prasad Singh* v. *Tej Bali Singh* and *Konammal* v. *Annadana Jadaya Gounder*. The learned Counsel for the assessee urges before us that the allowance is received by the younger brother as a member of the undivided family. On the other hand, the learned Counsel for the applicant relies on the second *Pittapur case* of *Rama Rao* v. *Raja of Pittapur* and a more recent case of *Shiba Prasad Singh* v. *Prayag Kumari Debee*, and contends that the right to maintenance is based on custom or grant and not co-parcenary interest.

The main question in the case is whether the income received by the younger brother is income received by him in his capacity

of a member of an undivided Hindu family or whether it is received by him by virtue of some other right. The question is of some general importance, and, in our opinion, requires an authoritative pronouncement. The cases cited on behalf of the respondent are cases not dealing directly with the right to claim maintenance but mostly with the rights of succession to an impartible estate whereas *Rama Rao* v. *Rajah of Pittapur* was a case relating to maintenance, but certain observations made in it, have been subsequently explained away by their Lordships of the Privy Council. The last mentioned case of *Shibad Prasad Singh* v. *Prayag Kumari Debee* was also a case of succession, although the rights of co-parceners in an impartible estate were discussed at page 1413 (of 39 Calcutta).

The question whether the income received as maintenance allowance is taxable or not has been the subject of decision in India, but has not so far been considered by their Lordships of the Privy Council. As it is an important matter affecting public revenue and is a question which might frequently arise, we think that this case is a fit one for appeal to His Majesty in Council under Section 66-A, sub-Section (2). We certify accordingly. We fix Rs. 200 as fee for the Counsel for the Income Tax Commissioner.

Certificate granted.

[IN THE PATNA HIGH COURT.]

ABDUL RAZAK

v.

COMMISSIONER OF INCOME TAX, BIHAR & ORISSA.

Courtney-Terrell, C.J., Mohammad Noor and Agarwala, JJ.

April 1, 1935.

INCOME TAX—APPEAL—ASSISTANT COMMISSIONER SENDING CASE BACK TO INCOME TAX OFFICER—OFFICER MAKING SURPRISE VISIT AND MAKING FRESH REPORT—DUTY OF ASSISTANT COMMISSIONER TO GIVE OPPORTUNITY TO ASSESSEE TO REBUT—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 23 (3).

In an income tax appeal the Assistant Commissioner sent the case back to the Income Tax Officer for a report on the facts and figures which would justify the estimate made by the Income Tax Officer, requesting the latter to give reasons for the estimate and to hold such local enquiry as he thought fit. The Income Tax Officer after summoning the assessee to appear before him to give evidence and to produce his books, paid a surprise visit to the assessee's shop and there discovered certain books which in his report he said were

books of the assessee which had not been disclosed. On receipt of his report the Assistant Commissioner acted upon it without giving an opportunity to the assessee to explain the books discovered :—

Held, (*i*) *that the assessee was entitled, on natural principles of justice, to an opportunity to rebut the information which constituted the basis of the report of the Income Tax Officer;*

(*ii*) *but there was no obligation on the Income Tax Officer to record or take evidence of witnesses cited by the assessee as the enquiry was made at the appellate stage under the direction of the Assistant Commissioner.*

Reference made by the Commissioner of Income Tax, Bihar and Orissa, under Section 66, sub-Section (3), of the Income Tax Act. (Miscellaneous Judicial Case No. 132 of 1933).

S. M. Gupta and *Navadwip Ch. Ghose*, for the assessee.

Manohar Lal, for the Commissioner.

COURTNEY-TERRELL, C. J. :—This is a statement of case under Section 66, sub-Section (3), Income Tax Act. The circumstances are a little unusual. The assessee is said to carry on a business of *Arhatadar* or commission agent for the sale of commodities. He was called upon by the Income Tax Officer to show his books and the Income Tax Officer made an assessment. The Income tax Officer therein stated that he had assessed an income of about Rs. 10,000 in respect of transactions by the assessee outside his ordinary business as an *Arhatadar*, that is to say in respect of private transactions in the sale and purchase of goods. The matter than went on appeal to the Assistant Commissioner. The Assistant Commissioner on reading the report of the Income Tax Officer and the estimate that had been made was unable to understand on what precise material the estimate of Rs. 10,000 has been made, and with a comment to the effect that the estimate must be on a basis and not a wild guess, he sent the matter back to the Income Tax Officer for a report on the facts and figures which would justify the estimate made by the Income Tax Officer who was requested, therefore, to give reasons for his estimate and to hold such further local inquiry as he thought fit and examine the railway register showing the transport of the goods before submitting his report. It would appear that the Income Tax Officer then summoned the assessee to appear before him, give evidence and produce his books and furthermore paid a surprise visit to the place of business of the assessee and there discovered certain books which in the report which he made, he said were books of the assessee relating to the business beyond the books which he had in fact disclosed, that is to say, the report to the Income Tax Officer went somewhat beyond the matters upon which he was directed to deal with and the material part of the report which he submitted was a statement of the fact of this surprise visit and the discovery of these books. On receipt

of this report by the Income Tax Officer, the Assistant Commissioner recited in his order that he had read the report but reduced the assessment from Rs. 10,000 at which it had been estimated by the Income Tax Officer to a sum of Rs. 7,000, otherwise the order of the Income Tax Officer was maintained. He apparently gave no opportunity to the assessee to explain the books which the Income Tax Officer had reported as having been found at the assessee's place of business. The assessee then went on appeal, to the Commissioner and the Commissioner dismissed the appeal, and amongst other points dealt with the contention of the assessee that he has not been able to deal with the allegations of fact made in the Income Tax Officer's report and that the Assistant Commissioner has not heard such evidence as he, the assessee, wished to offer on that topic. If it had been the fact that the Commissioner had said that, notwithstanding the conduct of the case by the Assistant Commissioner he on his part would give the assessee an opportunity of dealing with those facts before him (the Commissioner), the assessee would have had no grievance at all. But it is not clear from the order of the Commissioner whether in fact he heard the assessee or such evidence as might have been tendered by him; he merely supported the view of the Assistant Commissioner and refused to state a case on any of the points formulated from the proposed reference to the High Court The assessee then came to the High Court for an order asking that the Commissioner be directed to state a case, as a result the Court directed a statement of the case on two points. The first was:—

"Whether or not the applicant is entitled to an opportunity to rebut the information which constituted the basis of the report of the Income Tax Officer and whether an assessment made on information which the assessee had no opportunity to rebut or explain is invalid in law".

The question in this particular form had been formulated by the assessee himself and as formulated it is somewhat difficult to answer it in a satisfactory way. But, the first part of the first question is simple enough. It is clear on natural principles of justice that the new facts raised by the Income Tax Officer's report, that is to say, the allegations of the finding of the books and railway receipts and that these books and railway receipts so found related to the business of the assessee, were matters which the assessee should have had an opportunity of dealing with, in order to enable justice to be done. Therefore, to the first part of the question put in a general form I would answer in the affirmative, that is to say, that the assessee was entitled to an opportunity to rebut the allegation and an opportunity should be given to him by the Assistant Commissioner to do so. The second part of the first question does not arise. If after a reconsideration of the matter in the light of such evidence as the assessee may be able to produce the report of the Income Tax Officer is rebutted, the question formulated in the latter half of

the question will have solved itself. The second question propounded for our consideration was also formulated by the assessee :—

"Whether or not the Income Tax Officer was justified in not recording or taking the evidence of the witnesses cited and produced before him, as per *hazri*, from which only a legal inference could have been drawn."

I know of no obligation on the part of an Income Tax Officer to compel him to receive evidence of this kind and he is indeed entitled to act upon such information as may come to him through some private source or otherwise. It may be pointed out that under Section 23, sub-Section (3), the Income Tax Officer must hear such evidence as an assessee may produce, and such evidence as the Income Tax Officer may require on specified points to be committed in writing, that is to say, during the course of the assessment. But in this case the Income Tax Officer was asked by the Assistant Commissioner simply to report the basis of the assessment and it is an accident that he went beyond that instruction. It was because after the receipt of the order the Income Tax Officer paid a surprise visit to the business premises of the assessee and stated that fact in his further report that the difficulty has arisen. Therefore, as a general question the answer is to be found in Section 23 sub-Section (3), Income Tax Act. In this particular case the inquiry having been made at the appellate stage under the direction of the Assistant Commissioner there is nothing to require the Income Tax Officer to take the evidence produced.

As a result of this hearing the assessee is successful. He will receive back the Rs. 100 lodged by him and will be entitled to his costs and hearing fee, which we assess at ten gold mohurs.

MOHAMMAD NOOR, J.—I agree.

AGARWALA, J.—I agree.

Reference answered accordingly.

[IN THE MADRAS HIGH COURT.]

CHINNAMMAL ACHI *v.* CHENA MUNA SAITHKKATHI ROWTHER AND OTHERS.

Madhavan Nair, J.

March 22, 1935.

INCOME TAX ACT (XI OF 1922), SECTION 46 (2)—INSOLVENCY OF ASSESSEE—SALE BY OFFICIAL RECEIVER—ATTACHMENT FOR INCOME TAX BEFORE ADJUDICATION BUT SALE THEREUNDER AFTER SALE BY RECEIVER—PRIORITY OF TITLE.

A person became an insolvent in 1925, and his property was sold by the Official Receiver in January 1927 and purchased by the plaintiff. In 1924, i.e., *before the insolvency, the property sold had been attached in connection with proceedings under the Income Tax Act for non-payment of income tax and it was brought to sale under the Revenue Recovery Act and purchased by the defendant in May, 1927. The question being whether the plaintiff or the defendant had a better title:—*

Held, *that it is only if a sale is for land revenue that the purchaser gets a preferential title free from all encumbrances. Such priority does not attach itself to a sale for enforcement of other dues,* e.g., *income tax, even if the sale is held under the provisions of the Revenue Recovery Act, and the plaintiff had, therefore, a better title than the defendant.*

Second Civil Appeal No. 34 of 1933, against the decree of the Court of the Subordinate Judge of Devakottai in Appeal Suit No. 55 of 1932 preferred against the decree of the Court of the District Munsif of Devakottai in Original Suit No. 8 of 1929.

R. Kesava Aiyangar, for the appellant.

M. Subbaraya Iyer, for the respondent.

JUDGMENT :—The 5th defendant is the appellant. In this case the question for decision is as to who has better title on an undivided one-fifth share in the Ottakovil village, the suit property—whether the plaintiff or the appellant. According to the finding of the lower Courts this one-fifth share belonged to Arunachalam Chettiar. This finding has to be accepted in second appeal. Arunachalam Chettiar became an insolvent on September 9, 1925. As the result of this insolvency the property became vested in the Official Receiver. It was sold by him on January 17, 1927, and was purchased by the plaintiff. In 1924, that is, before the insolvency the entire village of which the suit property formed a share had been attached in execution of a decree. After attachment the property was sold under Ex. IV on May 27, 1927, and purchased by the 5th defendant. The sale certificate Ex. V, is dated November 9, 1928. This attachment and sale was in connection with proceedings taken under the Income Tax Act. For non-payment of income tax the village was brought to sale. Under Section 46 (2) of the Income Tax Act the amount of income tax has to be recovered from the assessee as if "it was an arrear of land revenue." Proceedings were taken by the Collector under the Revenue Recovery Act and the property was attached and sold as mentioned above.

It is argued that on account of the previous attachment of the property in 1924, no effective title can be given to it in favour of the plaintiff by the subsequent sale by the Official Receiver. It is clear that though the property has been attached and sold under the Revenue Recovery Act, the sale cannot give a higher title to the purchaser than the owner of the land himself would have given

if he had alienated the property privately. This appears to be clear from two decisions in *Thammayya* v. *Ramanna* (98 I. C. 201) and *R. M. V. V. M. Firm* v. *M. Subrahmania* (5 R. 458; 105 I.C. 258). It is only if the sale is for land revenue that the purchaser gets a preferential title free from all incumbrances. Such a priority does not attach itself to a sale for the enforcement of other dues even if the sale is held under the provisions of the Revenue Recovery Act. The appellant here cannot on the ground that the attachment and the sale were held under the provisions of the Revenue Recovery Act claim a better title than the plaintiff. The attachment will have only the effect of an ordinary attachment as in the case of ordinary sales held under the Civil Procedure Code, and nothing more. In support of his contention the appellant relied upon a decision in *Anantapadmanabhaswami* v. *Official Receiver of Secundrabad* (56 Mad. 405). In that case it was held that an adjudication at Secundrabad which was a foreign Court operated in British India only under private international law, and having regard to Section 64 of the Code, did not affect the rights of the attaching creditor. It is argued that the principle of that decision should be applied, and the rights of the 5th defendant should prevail against the right of the plaintiff, but the judgment makes it clear that that decision would be inapplicable if the adjudication took place in the British Court. The difference is pointed out by their Lordships of the Privy Council at p. 413 of the judgment wherein they state as follows :—It is irrelevant to consider what effect a British Indian adjudication order would have had on the appellant's prior attachment," thereby suggesting that if the adjudication had taken place in British India the title obtained by the sale effected by an Official Receiver would certainly have preference over the attachment and sale under the Civil Procedure Code. But the matter is made clearer in the following sentence :

"Equally it is irrelevant to point out that a British Indian adjudication order would not be affected by the prohibitory provisions of Section 64 of the Code as it is not a private transfer. Such an order operates *vi statuti* but the foreign adjudication order does not operate in British India *vi statuti* but only under the rule of private international law."

The decision, therefore is distinguishable and does not help the case of the appellant. It therefore follows that since the title to the property so far as the appellant is concerned, accrued only on November 9, 1928, that is, subsequently to the sale by the Official Receiver, the title which the plaintiff obtained from the Official Receiver should have priority to the claims of the 5th defendant though the property was attached as early as 1924. I accept the opinion of the lower Appellate Court and dismiss the Second Appeal with costs.

Appeal dismissed.

[IN THE BOMBAY HIGH COURT.]

COMMISSIONER OF INCOME TAX, BOMBAY

v.

GOMEDALLI LAKSHMINARAYAN.

Beaumont, C. J., and Rangnekar, J.

March 28, 1935.

'HINDU UNDIVIDED FAMILY'—FAMILY CONSISTING OF SINGLE MALE MEMBER AND FEMALE MEMBERS ENTITLED TO MAINTENANCE—WHETHER ASSESSABLE AS UNDIVIDED FAMILY—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 3 AND 55.

There was a joint Hindu family consisting of a father and his wife, and a son and his wife. The father died, and in the year of assessment the joint family consisted of the son, his mother and his wife. The Commissioner of Income Tax referred to the High Court the question whether the income received by the son should be regarded as his own individual income or as the income of 'a Hindu undivided family' for the purposes of assessment to super tax under Section 55 of the Indian Income Tax Act:

Held, *that the expression 'Hindu undivided family' as used in the Income Tax Act is much wider than the expression 'coparcenary; it includes families consisting of a sole surviving male member and female members entitled to maintenance, and the income of the assessee should, therefore, be treated as the income of a Hindu undivided family.*

Cases referred to:

MOOLJI SICKA, *In re* [1935] (3 I.T.R. 123) *dissented from.*

VEDATHANNI *v.* COMMISSIONER OF INCOME TAX, MADRAS [1932] (I.L.R. 56 MAD. 1; 1933 I.T.R. 70; 140 I.C. 70; 63 M.L.J. 542; A.I.R. 1932 Mad. 733) *followed.*

Case stated by the Commissioner of Income Tax Act, Bombay under Section 66 (2) of Income Tax Act (Civil Reference No. 15 of 1934).

The facts are stated fully in the judgment.

K. Mc I. Kemp and *Louis Walker*, for the Commissioner.

Chimanlal Setalvad, N. P. Engineer and *Raghavayya,* for the assessee.

BEAUMONT, C. J.—This is a reference made by the Commissioner of Income Tax under Section 66 (2), Income Tax Act, and the first question raised is:

Whether, in the circumstances of the case, the income received by right of survivorship by the sole surviving male member of a Hindu undivided family can be taxed in the hands of such male

member as his own individual income, or it should be taxed as the income of a Hindu undivided family, for the purposes of assessment to super-tax, under Section 55, Income Tax Act, 1922."

The facts are that there was a joint Hindu family consisting of a father and his wife and a son and his wife, the son being the present assessee. The father died in 1929 before the year of assessment, so the joint Hindu family then consisted of the son, his mother and his wife and the question raised by the Commissioner appears to me to admit the existence of a joint Hindu family. Of such existence, I think there can be no question. It is clear law that you may have a joint Hindu family consisting of one male member and female members who are entitled to maintenance, although that does not mean that every Hindu who possesses a wife and a mother is necessarily a member of a joint Hindu family as Lort-Williams, J., seems to think in the Calcutta case referred to below. The question raised is whether the assessee is to be assessed as an individual or as a member of the joint Hindu family, and the importance of the question lies in this, that for the purposes of super-tax he will be allowed a large exemption if he is taxed as the manager of a joint Hindu family than if he is taxed as an individual.

The Income Tax Act refers in various sections to a Hindu undivided family, though that expression is nowhere defined. A Hindu undivided family is a unit for taxation under Sections 3 and 55 and under Section 14(1) it is provided that the tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family, which seems to mean that as a Hindu undivided family is taxed as a unit, the individual members thereof are not liable to be charged in respect of what each member receives as his or her share of the joint income. The nature of a Hindu undivided family was perfectly well-known to the legislature when the Income Tax Act was drafted, and it was well-known that the expression "Hindu undivided family" includes females, and is much wider than the expression "coparcenary" which includes only the males in whom the joint family property is vested. It is argued by the Advocate-General that the Act, dealing as it does with property, when it refers to a Hindu undivided family, really means to denote the coparceners, that is to say, male members of the family in whom the family property is vested. I see no ground for arriving at that conclusion, since the meaning of the two expressions was well-known when the Act was drafted, and the legislature has thought fit to use the wider expression rather than the narrower one. I have no doubt that this was deliberate. The more liberal allowance to a joint family in respect of super-tax was presumably given because the whole income of the family would not go to one individual. If there were a large number of male members, each member would get only a small portion of the income, and it would be hard to charge the family with super-tax

merely because the joint income was over the limit at which super-tax commences for an individual. But the same principle would apply, though perhaps to a less extent, to the case of a Hindu joint family consisting of one male member and several female members entitled to maintenance, where maintenance might absorb a large share of the family income.

It has been held by a Special Bench of the Madras High Court in *Vedathanni* v. *Commissionerof Income Tax, Madras*, that one male member and the widows of deceased coparceners can form a joint Hindu family, and that therefore arrears of maintenance received by a widow of a deceased coparcener are exempt from tax, under Section 14 (1) of the Act. If we were to accept the view contended for by the Advocate-General, I think we should have to differ from the basis of that decision, and I see no reason for so doing. We have also been referred to a decision, at present unreported, of a Division Bench of the Calcutta High Court consisting of LORT-WILLIAMS and JACK, JJ. See *Moolji Sicka, In re* [1935] I T.R. 123]. Whe have only an uncertified copy of the judgment and therefore I hesitate to deal in any detail with the reasoning in the judgment, but the effect of the decision appears to be that references in the Income Tax Act to a Hindu undivided family should be read as referring to a coparcenary. I am unable to agree with that view which seems to me inconsistent with the words of the Act. I think therefore the first question submitted to us must be answered by saying that the income of the assessee should be taxed as the income of a Hindu undivided family for the purposes of super-tax under Section 55. The second question " Whether, under the circumstances of the case, the assessment as levied in this case is in order " must be answered in the negative. The Commissioner to pay the costs of the assessee to be taxed by the Taxing Master on the Original Side scale.

RANGNEKAR, J.—The question raised on this reference is whether the assessee is liable to be taxed as an individual or a representative of an undivided Hindu family. The importance of the question lies in the fact that an undivided Hindu family is treated as a single unit for assessment under Section 3 of the Act and is also entitled to a larger exemption in the matter of assessment to super-tax. The facts are that the assessee, his father, mother and wife formed a joint Hindu family. They were possessed of an ancestral property which on the death of his father devolved on the assessee by survivorship, and thereafter he and his widowed mother and his wife continued to live together as members of an undivided Hindu family. Under Section 2 (9) of the Income Tax Act, a Hindu undivided family is included under the definition of "person," but has not been otherwise defined anywhere in the Act. In my opinion therefore the expression must be construed in the sense in which it is understood under the Hindu law. Under the Hindu law, an

undivided Hindu family is composed of (a) males and (b) females. The males are (1) those that are lineally connected in the male line; (2) collaterals; (3) relations by adoption; and (4) poor dependents. The female members are (1) the wife or the widowed wife" of a male member, and (2) maiden daughters. The commentaries mention female slaves and illegitimate sons also as being members of an undivided Hindu family. I shall content myself by referring to two well known text-books. Mayne in his work at p. 344 observes as follows:

"The whole body of such a family, consisting of males and females......some of the members of which are coparceners, that is, persons who on partition would be entitled to demand a share, while others are only entitled to maintenance."

Then dealing with what is called coparcenary, the learned author at p. 347 observes:

"Now it is at this point that we see one of the most important distinctions between the coparcenary and the general body......"

I think perhaps a more accurate description of what a Hindu undivided family means is given by Sir Dinshah Mullah in his Principles of Hindu Law, Edn. 7, at p. 230, in these words:

" A joint Hindu family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters."

An undivided Hindu family in this sense differs from what is called a Hindu coparcenary, which is a much narrower body. A Hindu coparcenary includes only those male members who take by birth an interest in the coparcenary property. This is what is known as *apratibandha daya* or unobstructed heritage, which devolves by survivorship. They are the generations next to the last holder in unbroken male descent. The Crown contends that the assessee was the sole surviving coparcener and therefore free to deal with the property in any way he liked, and that being so, there was no undivided Hindu family. Now under the Hindu law undoubtedly the sole surviving coparcener has wider powers to deal with property which he takes by survivorship. But these powers are subject to well recognised rights of the female members of the family. Thus the widow of a deceased corparcener has a right to be maintained out of the family property and a right to a due provision for her residence. An unmarried daughter has a right to maintenance and residence and to marriage expenses. Similarly the disqualified heirs, as the blind, the deaf, etc., have similar rights. If the rights of these persons are threatened, or if the holder of the estate is dealing with the property in a manner inconsistent with or so as to endanger the rights of these persons, he may be restrained by a proper action from acting in that manner. Similarly, the widow of a deceased coparcener

may adopt a son to her deceased husband and he would therefore become a coparcener with the sole surviving coparcener. Then the expenses of religious ceremonies, such as the *shraddha* relating to deceased coparceners have also to come out of the property. I need not refer to the other restrictions on the power of the sole surviving coparcener. Therefore, because there is no coparcenary, it does not follow that there is no undivided Hindu family. The joint status of the family does not come to an end merely because for the time being there is only one member of the family who is in possession of the family property.

It is clear therefore that there is a sharp distinction between what is understood in the Hindu law by the expressions " undivided Hindu family " and " coparcenary." Now these two expressions which are known to every Hindu lawyer were before the legislature when the Income Tax Act came to be enacted. It is a canon of construction that one cannot impute ignorance to legislature of well-known legal expressions. The legislature must be presumed to be acquainted with not only the actual state of the law but with the legal interpretation put upon technical expressions by the Courts. If then the legislature chose to adopt a wider expression like " undivided Hindu family " instead of the narrower one " coparcenary ", the Courts have no option left but to construe the wider expression in the way in which it has been construed and understood under the Hindu law. To put a narrower meaning on the expression " undivided Hindu family " as the Crown wants us to do, would, in my opinion, be legislating instead of interpreting the section. The view which we are taking is not without authority, and I need refer only to *Vedathanni* v. *Commissioner of Income Tax, Madras*. It is said that that was a decision under Section 14 (1), Income Tax Act, but reading the judgment carefully, it seems to me that the point which has arisen before us also arose before the Judges of the Madras High Court, and the whole *ratio decidendi* of that case is that the expression " undivided Hindu family " has to be understood in the sense in which it is understood in the Hindu law. The learned Advocate-General has referred to an unreported decision of the Calcutta High Court and produced an uncertified copy of the judgment I have no hesitation in saying, with respect to the learned Judges in that case, that their reasoning does not appeal to me and is opposed to the fundamental principles of the Hindu law. For these reasons, I agree that the questions raised must be answered in the manner proposed by my Lord the Chief Justice.

Reference answered.

[IN THE BOMBAY HIGH COURT.]

COMMISSIONER OF INCOME TAX, BOMBAY

v.

GOPAL VAJINATH MANOHAR.

Beaumont, C. J., and Rangnekar, J.

April 1, 1935.

RE-ASSESSMENT—'ESCAPE OF INCOME', WHAT CONSTITUTES —MERE WRONG ESTIMATE OF INCOME—POWER TO REVISE— INCOME TAX ACT (XI OF 1922), SECTION 34.

The assessee carried on the business of buying and selling gold and silver. As he kept no books of account and his income could not be ascertained with accuracy the Income Tax Officer assessed the income at 3 per cent. on the sale of gold and 5 per cent. on the sale of silver and on that basis he made an assessment under Section 23 (3) of the Income Tax Act. In the next year of assessment a different Income Tax Officer dealt with the matter. He thought that, as the price of gold had risen very rapidly during the last two months of the previous year of assessment, his predecessor had under-estimated the profits derived from the sale of gold. He considered that the flat rate on sale of gold should have been 15 per cent. instead of 3 per cent. and on that basis he came to the conclusion that income had escaped assessment in the previous year and re-assessed that income under Section 34. On appeal the Assistant Commissioner agreed generally with this view. The question whether in the circumstances of the case a part of the income of the previous year had 'escaped' assessment within the meaning of Section 34 was referred by the Commissioner:

Held, *that the evidence merely showed that the Income Tax Officer of the subsequent year thought that his predecessor had made a wrong assessment as to income and that in his opinion on the facts the estimate of his predecessor was too low. This was not proof that any income had 'escaped' assessment or was assessed at too low a rate and the re-assessment under Section 34 was therefore illegal.*

Held further, *that the burden of showing that income has escaped assessment or that it has been assessed at too low a rate lies on the Commissioner.*

ANGLO PERSIAN OIL COMPANY (INDIA) LTD. [1933] (I. L. R. 60 Cal. 840; 149 I.C. 919; 37 C.W.N. 430) and

COMMISSIONER OF INCOME TAX *v.* RAJA OF PARLAKIMEDI [1926] (I.L.R. 49 Mad. 22; 91 I.C. 940) *followed.*

COMMISSIONER OF INCOME TAX, BURMA *v.* U LU NYU [1933] (I. L. R. 12 Rang. 18; 146 I. C. 300; 1933 I. T. R. 373) *commented upon.*

Case stated by the Commissioner of Income Tax, Bombay under Section 66 (2) of the Indian Income Tax Act (Civil Ref. No. 2 of 1935). The material facts are stated in the judgment of the Chief Justice.

K. Mc I. Kemp and *G. Louis Walker*, for the Commissioner of Income Tax.

N.P. Engineer, *Ranchoddas* and *Hakim*, for the assessee.

JUDGMENT.

BEAUMONT, C. J.—This is a case stated by the Commissioner of Income Tax under Section 66 (2) of the Indian Income Tax Act. The question arises in this way. The assessee carries on business at Nasik as a money-lender, and he also buys and sells gold and silver. He buys ornaments, turns them into metal, and sells the metal in Bombay. He keeps no books of account, and therefore the Income Tax Officer was not able to ascertain with accuracy what the profits were from the sales of gold and silver, but in the year of assessment, 1932-33, the Income Tax Officer added to the assessee's income a certain percentage on the sale of gold and silver, three per cent. on the sale of gold and five per cent. on the sale of silver, and on that basis he made the assessment under Section 23 (3) of the Act. In the next year of assessment a different Income tax Officer dealt with the matter, and he came to the conclusion that, as the price of gold had risen very rapidly during the last two months of the previous year of assessment, the Income Tax Officer for that year had under-estimated the profits derived from the sale of gold; he considered that the flat rate on sale of gold should have been fifteen per cent. instead of three per cent. and on that basis he came to the conclusion that income had escaped assessment for the year 1932-33, and he therefore re-assessed the income under Section 34, Income Tax Act. There was an appeal to the Assistant Commissioner, who agreed generally with the view taken by the Income Tax Officer, but for some reason, which is not apparent, he assessed the income on the sale of gold at four per cent. on the sale price, and the income on the sale of silver at ten per cent. on the sale price; that is to say, he raised the original rate by one per cent. in the case of gold and five per cent. in the case of silver, and made an assessment on that basis.

The question which the Commissioner has raised is:

Whether in the circumstances of the case, a part of the income, profits and gains from sales of gold in the year 1987 Samvat can be said to have 'escaped' assessment within the meaning of Section 34, Income Tax Act, 1922, at the time of the original assessment for the year 1932-33.

That question purports to be a summary of three questions which the assessee had desired to raise, and which related to the income generally of the assessee and covered income from the sale of silver as well as his income from the sale of gold. I think the omission in the question raised by the Commissioner, of any reference to the sale of silver must be by inadvertence. Clearly, having regard to the assessment made by the Assistant Commissioner, the question should cover both the sale of gold and of silver in Samvat 1987. The question should be amended in that way.

We have had some discussion as to the meaning and scope of Section 34, Income Tax Act. That section provides that if for any reason the income, profits or gains chargeable to income tax has escaped assessment in any year or has been assessed at too low a rate, the Income Tax Officer may, within a time limit therein specified, re- assess such income. It seems to me that the burden of showing that income has escaped assessment or that it has been assessed at too low a rate lies on the Commissioner. We have been referred to a decision of the Full Bench of the Rangoon High Court in *Commissioner of Income tax, Burma* v. *U Lu Nyu* as supporting the proposition that income from a particular source cannot be re-assessed under Section 34. I agree with the actual decision in that case which was one where the Income Tax Officer of the subsequent year disagreed with the estimates of the officers in the previous year, but in the course of his judgment the learned Chief Justice said that the Income Tax Officer had no jurisdiction to revise the assessment for the previous year which was completed and had become final. If that proposition is correct, it would confine Section 34 to cases in which a source of income has escaped assessment, which in my view is too narrow a limit. I feel no doubt that if it were proved that Rs. 2,000 had been received as income from a particular source, while the assessment was only on Rs. 1,000, or if it were proved that the assessment was at a flat rate of three per cent., whilst in fact profits at a higher rate had been made, then income would have escaped assessment within the meaning of Section 34. That view was taken by the Calcutta High Court in *In re The Anglo Persian Oil Co. (India) Limited*, and by the Madras High Court in *Commissioner of Income Tax, Madras* v. *Raja of Parlakimedi*, with both of which decisions I agree. The question in this case really is whether the Income Tax Officer has proved that any income escaped assessment. In my opinion all that the evidence comes to is that the Income Tax Officer of the subsequent year thinks that the Income Tax Officer of the earlier year made a wrong assessment as to income, and he gives his reasons for so thinking. But he does not prove that in fact the assessee received any greater income than the income in respect of which he was assessed. It is not suggested that any facts which were before the second Income Tax Officer were not before the first Income Tax Officer. I guard myself against expressing any opinion upon what the position would be if it were shown that the assessee has given false evidence or

suppressed material facts, and thereby induced the assessment made by the first Income Tax Officer. That is not the case here. The first Income Tax Officer knew, or had the means of knowing, that the price of gold was rising and with that fact before him he estimated the profits at a particular rate on sales, and the second Income Tax Officer does no more than say that in his opinion on the facts the estimate of the first Income Tax Officer was obviously too low. That is not proof that any income escaped assessment or was assessed at too low a rate. In my opinion the question, amended as I have suggested, must be answered in the negative.

The assessee to have his taxed costs from the Commissioner on the Original Side scale.

RANGNEKAR, J.—I agree. I think the burden of proving that the income has escaped assessment within the meaning of Section 34, Income Tax Act, was on the income tax authorities and it has clearly not been discharged. The question as to the true construction of Section 34 of the Act was raised on behalf of the assessee, and I would like to state my view upon it. There seem to be from the decided cases two views taken as regards the meaning of this section. One view is that the section is used in correcting an assessment in which deduction has been improperly allowed or a low rate has been calculated or there has been under-assessment otherwise. The other view is that the word "escaped" refers to income which has actually escaped assessment and not to any income which has already been the subject of assessment. In my opinion the first view is correct. The words of the section are clear, and upon the plain meaning of the section there seems be no reason to limit the scope of the section. All that the section means is that if in the taxing year the income assessed is not the whole of the income in the year of assessment, then within a time-limit provided in the section it is open to the income tax authorities to revise it, whether the assessment previously made was inadvertent or deliberate or was due to a wrong allowance or improper deduction or a low rate. I respectfully dissent therefore from the view taken by the Rangoon High Court in *Commissioner of Income Tax* v. *U. Lu Nyu* where it was held that it was not open to an Income Tax Officer to go behind and revise the assessment made by his predecessor which was completed and had become final. In my opinion the remarks of the learned Chief Justice in that case in the last paragraph at p. 121 are too wide and do not correctly represent the meaning of the section. In my opinion the true meaning of the section is as indicated in the remarks, though *obiter*, of Chief Justice RANKIN in *In re the Anglo Persian Oil Company India Ltd.* at p. 845, namely:

"I see no way of holding that Section 34 is inapplicable to put right an assessment, by which a deduction has been improperly

allowed. Such a case is, in my opinion, a case of income escaping assessment".

I agree therefore that the question raised must be answered in the negative.

Answer accordingly.

[IN THE BOMBAY HIGH COURT.]

COMMISSIONER OF INCOME TAX, BOMBAY

v.

CHUNILAL B. MEHTA.

Beaumont, C. J., and Rangnekar, J.

March 27, 1935.

INCOME TAX—FOREIGN EXCHANGE BUSINESS—PROFITS MADE OUTSIDE BRITISH INDIA BY PERSON RESIDENT IN INDIA—WHETHER ASSESSABLE IN INDIA—'ACCRUE OR ARISE,' MEANING OF—TESTS OF ASSESSABILITY—ENGLISH AND INDIAN LAW—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 4.

The assessee carried on business in Bombay as a broker in cotton, silver and other commodities and he also did business on foreign exchange. The essential feature of the foreign exchange business was as follows: The assessee sent instructions from Bombay by telegram to a broker in New York or Liverpool to buy or to sell commodities. The broker accepted the instructions in New York or Liverpool, as the case may be, entered into the requisite contracts with third parties on the foreign exchange, and notified the assessee accordingly. It was admitted that the profits arising from the foreign exchange business (which in the year of account amounted to Rs. 11 lacs odd) were not brought into British India. The Commissioner of Income Tax referred to the High Court the question whether these profits could be said to have accrued or arisen in British India and were assessable under the Indian Income Tax Act:

Held, *that the profits in question accrued or arose in New York or Liverpool, as the case may be, where the contracts were made by the broker; the fact that the contracts were entered into by reason of instructions received from Bombay on behalf of a principal in Bombay did not affect the place where the profits accrued or arose, nor did the fact that the profits depended on the exercise in Bombay of knowledge, skill and judgment on the part of the assessee and upon instructions emanating from Bombay involve that the profits accrued or arose in British India; and the profits were not therefore assessable to income-tax in British India.*

Held, further, *that it made no difference whether the contracts of sale and purchase were followed or intended to be followed by actual delivery of the commodities or mere payment of differences.*

It cannot be said that because a business is carried on in British India all profits arising from that business must be held to accrue in British India.

Section 4 of the Indian Income Tax Act refers to the place where the profits accrued or arose and not the place where the person who is the ultimate source of profit resides or carries on business.

The words 'accruing or arising' extend the scope of the tax to income which may not be received in British India.

English authorities on this question are irrelevant since the English Act does not deal with the place where profits accrue or arise.

In construing a taxing Act the Court ought not to strain the language of the Act against the tax payer and a subject is not to be taxed unless the language of the statute clearly imposes the obligation.

Cases referred to:

AURANGABAD MILLS, LTD., *In re* [1921] (I.L.R. 45 Bom. 1286; 64 I.C. 9; 23 Bom. L.R. 570.)

BOARD OF REVENUE, MADRAS v. RAMANATHAN CHETTI [1920] (I.L.R. 43 Mad. 75; 53 I.C. 976; A.I.R. 1920 Mad. 344).

COMMISSIONERS OF TAXATION v. KIRK [1900] (1900 A.C. 588; 69 L.J.P.C. 87; 83 L.T. 4).

DOCK COMPANY AT KINGSTON-UPON-HULL v. BROWNE [1831] (36 R.R. 459).

Case stated by the Commissioner of Income Tax, Bombay under Section 66 (2) of the Indian Income Tax Act (XI of 1922), Civil Reference No. 11 of 1934, decided on March 27, 1935.

The necessary facts are stated fully in the judgment.

K. Mcl Kemp and *G. Louis Walker*, for the Commissioner.

K. M. Munshi and *D. K. Petigara*, for the Assessee.

BEAUMONT, C. J.—This is a reference made by the Commissioner of Income Tax under Section 66 (2), Income Tax Act, 1922, and it raises a question of considerable importance, and not, I think, easy to answer. The facts out of which the question arises are not in dispute. The assessee carries on business in Bombay as a broker in cotton, silver and other commodities, and he also, as a

regular business, enters into contracts on his own behalf for the sale and purchase of such commodities with persons in British India and also with persons outside British India, particularly in New York and Liverpool, which are the places with which we have to deal on this reference. During the year of assessment, which is the year terminating on 31st March, 1934, the assessee made a profit of Rs. 11,54,830 from the business of buying and selling commodities outside British India, and the question is whether he is liable to be assessed in respect of this sum. The actual questions raised by the Commissioner are:

"(1) Whether in the circumstances of the case all the profits and gains which accrued and arose to the assessee from the business of future delivery contracts entered into with parties outside British India in which no delivery was ever taken or given or any part of such profits and gains can be said to have accrued or arisen in British India; and (2) Whether as regards that part of the said business of future delivery contracts in which delivery had been actually taken or given outside British India, the profits or gains which accrued can be said to have accrued wholly or partly in British India."

In my opinion no distinction in law exists between the classes of business referred to in the two questions. It makes no difference whether the contracts of sale and purchase were followed, or intended to be followed, by actual delivery of the commodities; or, whether the contracts of sale and purchase were intended to be closed, and were closed, by corresponding contracts of purchase and sale, so as to result merely in payment of differences. In either case the nature of the contract in law is the same. Nor do I think was there any essential difference between the business conducted in New York and the business conducted in Liverpool, and I think the Commissioner has not correctly appreciated the rules of the Liverpool Cotton Exchange to which he refers In the case of business contracted both in New York and Liverpool the essential features were the same. The assessee in Bombay instructed by telegram a broker in New York or Liverpool to buy or to sell commodities, and the broker accepted the instructions either in New York or Liverpool, as the case may be, and entered into the requisite contracts with third parties on the foreign exchange, and notified the assessee accordingly. It is admitted that the profits arising from this class of business during the year of assessment have not been received in British India, and the question is whether these profits accrued or arose in British India. That question depends on the construction of Section 4 (1), of the Income Tax Act, which provides:

"4. (1) Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in Section 6, from whatever source derived, accruing, or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

There is no question here of the profits being deemed to accrue or arise in British India; the question is whether they did in fact accrue or arise in British India. Now it is clear that the words "accruing or arising" extend the scope of the tax to income which may not be received in British India, and that if moneys are earned by carrying on a business or by exercising a profession in British India, liability to tax cannot be avoided by arranging that the moneys are to be paid outside British India. It is, I think, also clear that the question to be determined in this connection is the place where the profits accrue or arise, and not the place where the business in which the profits are earned is carried on, or where the assessee resides; and this point to my mind renders authorities on the English Act irrelevant, since the English Act does not deal with the place where profits accrue or arise.

The contention of the assessee is that his right to profits arose in each case under the contract made with his broker, that that contract was made outside British India where the instructions were accepted and acted upon, that the carrying out of the contract by the broker, including the contracts with third parties, which he entered into, took place outside British India, and that accordingly the profits accrued and arose out of British India. The assessee relies on two cases, *Board of Revenue, Madras* v. *Ramanadhan Chetti* and *Aurangabad Mills, Ltd., In re*, in both of which a business owned by a person or company resident in British India was carried on by agents outside British India, and it was held that, as all the processes which resulted in profits took place outside British India, the mere fact that the owner and controller of the business was in British India did not make the profits accrue or arise in British India. The Advocate General contends, on the other hand, that in this case the whole control of the business was with the assessee in British India, that it was he who in Bombay, exercising his skill and judgment, gave the instructions which ultimately resulted in the accrual of profits, and that therefore the profits accrued in British India. He relies on various decisions on the English Act, which, for the reason I have already given, appear to me to be irrelevant, and he also relies on the decision of the Privy Council in *Commissioners of Taxation* v. *Kirk*. In that case their Lordships were considering a New South Wales statute in which the relevant word was "derive," which their Lordships treated as equivalent to "arise or accrue." The profits in question were derived from the business of mining on leasehold lands held from the Crown in New South Wales, and their Lordships held that the process resulting in the profits consisted of four parts, *viz.*, (1) the extraction of the ore from the soil; (2) the conversion of the crude ore into a merchantable product; (3) the sale of the merchantable product; and (4) the receipt of the moneys arising from the sale; and they held that as the first two processes took place in New South Wales the profits were derived there.

The case may be an authority for the proposition that profits may be said to accrue in a country although all the acts which

result in such profits do not take place there, but to my mind the case has no bearing on the matter with which we have to deal. The profits in the present case in fact accrued or arose under the contracts made by the broker. The broker in Liverpool or New York enters into a contract to buy 500 bales of cotton, and he enters into another contract for sale of 500 bales, and it is on the working out of those two contracts that profit accrues. The fact that the contracts are entered into by reason of instructions received from Bombay on behalf of a principal in Bombay does not to my mind affect the place where the profits accrue or arise; it only affects the title to the profits when made. The question which we have to determine is really this: Does the fact that profits arising under contracts made abroad depend on the exercise in Bombay of knowledge, skill and judgment on the part of the assessee, and upon instructions emanating from Bombay, involve that the profits accrued or arose in British India? To my mind it does not. Analogies in such cases are dangerous because not exact, but I will give one illustration which serves to illustrate my view of the matter. Take the case of a man exercising the profession of a novelist in British India. He writes a novel in British India and sends it to his agent in England with instructions for its publication there. The agent makes an agreement in England under which profits accrue to the author which are retained in England. In such a case can it be said that the profits accrued or arose in British India because the novel was written in British India and the instruction for its publication came from there? In my opinion the answer to that question must be in the negative. It seems to me that if the Crown is right, their case must be put as high as this (and the Advocate-General did not hesitate so to put it): that once you find that a business is carried on in British India, all profits arising from that business must be held to accrue in British India. To my mind, so to hold, would be to strain the language of Section 4, which deals with the place where the profits accrue or arise and not the place where the person who is the ultimate source of profit resides, or carries on business. In construing a taxing Act the Court ought not to strain the language of the Act against the taxpayer. In my opinion therefore both the questions asked by the Commissioner must be answered in the negative. The Commissioner to pay the costs of the assessee to be taxed on the orginal side scale.

RANGNEKAR, J.—The question on this reference is whether the profits made by the assessee as the result of certain operations carried on by him on the New York and Liverpool Cotton Exchange are liable to be taxed under Section 4 (1) of the Income Tax Act. The nature of the transactions and the manner in which they were carried on is not now in dispute, though it seems to me the income tax authorities have not properly appreciated the same. The assessee has a business of his own in Bombay and he also does business on foreign exchange, and the way in which he does this is

that he sends orders from Bombay by telegram to his broker at these places and the latter who is a member of the local exchange executes the orders as a broker on behalf of the assessee, and on the transactions being put through, informs the assessee of the same. As the result of these transactions the assessee in the accounting year earned a sum of Rupees 11 lakhs odd, which admittedly has not been brought into British India or received in British India, and it is this sum which the Crown says is liable to be taxed under the Income Tax Act. The learned Commissioner had held that the business was speculative. This, in my opinion, is due to the fact that he has not properly appreciated the legal position. However, the nature of the business in question is clearly irrelevant under Section 4 of the Act and I need not discuss this matter further.

The principal charging sections are Sections 3 and 4. Section 3 lays down who is to pay the tax. Section 4 describes the nature of the income that may be taxed.

The scheme therefore is that the Act applies to all income from whatever source derived (*a*) accruing in British India, (*b*) arising in British India, or (*c*) received in British India. Then there are some sections under which although the income may not accrue or arise or be received in British India, still it may be deemed to accrue, arise or be received in British India. The assessment in this case is made under the charging Section 4 (1) of the Act, and the only question which arises for determination is whether within the meaning of that section this sum can be said to have accrued or arisen in British India. The section is in the following terms:

'Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in Section 6, from whatever source derived, accruing, or arising, or received in British India, or deemed under the provisions of this Act to accrue or arise, or to be received in British India.'

It will be seen from the language of Section 4 (1) that what it charges is the income in British India and that the place of the source is immaterial. It is the place where the income accrues, etc., that matters. Thus, for example, "property," which is one of the specified sources in Section 6 of the Act, may not be in British India and yet the income from it may and can accrue, etc., in British India and then it will be caught under the section. Similarly, the right to receive the income in British India is also immaterial as also the question whether the income derived from any source is payable in British India. Nor does the question of residence of the person liable under Section 3 arise under Section 4 (1). Therefore what is important under these sections is the place where the income accrues, etc., and the person to whom it accrues, etc. It is clear that the latter question arises only under Section 3 and not under Section 4 (1).

Then it seems to me there is a distinction between the terms "accruing" or "arising" and "receiving" in British India, and the terms "accruing" or "arising" must connote something more than the expression "received." Income may accrue or arise outside British India, but if received in British India, it will attract the tax under Section 4 (1). Similarly, it is obvious that the income may accrue in one place, arise in another, and may be received in a third place, and before it can be taxed it must be shown that either it has accrued or arisen or received in British India. The question then is whether the income in this case can be said to have accrued or arisen in British India.

Now, in considering this question, the circumstances of each case have to be considered, and the question becomes complex when as here the activities which resulted in the income took place partly in and partly outside British India. In this case the assessee employed a broker to put through certain transactions. There is no evidence before us as to the agreement between the broker and the assessee. Ordinarily the broker was not bound to put through the transactions and he could refuse to carry out the order sent to him. Then on the facts of the case the contract of agency must be deemed to have been made outside British India. Then the broker put through the transactions on the two exchanges. The contracts which resulted in the income also were made outside British India. A contract is made at the place where the offer is accepted. It is difficult therefore to hold in these circumstances that the profits accrued or arose in British India.

The Commissioner thought the assessee was carrying on business in Bombay, that the control of the business was with the assessee, and therefore the profits from the business accrued or arose in British India. The same argument has been put before us by the learned Advocate-General, who seems to have gone much further. He says that if it is established that the assessee is carrying on business in British India, then the profits which he makes—which must be attributed to the business—must accrue or arise in British India, because they come home to him in British India. I am unable to accept this contention. To accept this argument is to hold that if there is a right to receive the income in British India, then irrespective of all other considerations, the income must be deemed to accrue in British India. That, in my opinion, is clearly not what is within Section 4 (1). Then it is said that the assessee was exercising control over the business and it was his skill and ingenuity that resulted in the income. I think it is established by authorities that even if the control of the business is exercised in British India, if the transactions which ultimately resulted in the income took place outside British India, then it could not be said that that income accrued or arose in British India. I need refer only to *Board of Revenue, Madras* v. *Ramanathan Chetti* and *Aurangabad Mills Ltd., In re,*

The learned Advocate-General has sought to distinguish these cases and he says that in those cases the real control was exercised not by the owner in British India but by his servants or agents who actually were entrusted to carry on the operations which resulted in the income. One answer to that is that, after all, they were the servants of the owner of the business and it cannot be denied on the facts of these cases that it was open to the owner of the business to control their operations as regards the business. Then it is said that the assessee was exercising his judgment and skill in regard to the business which he put through the brokers on these exchanges. I feel some doubt as to the correctness of this position. Undoubtedly, to a certain extent, at any rate, initially, the assessee decided when to send the order to the broker and the nature of it. But that is not all. The subsequent transactions must, to a certain extent, having regard to their nature, depend upon the skill and judgment of the broker. But assuming the income entirely depended on the skill and judgment of the assessee in British India, what then? In my opinion this is not the test for ascertaining the nature of the income liable to tax under Section 4 (1), unless something more is read in the section.

In my opinion the scheme of the Act, including in particular the sections under which the income which in fact had accrued outside British India is caught by providing that it shall be deemed to have accrued in British India, is against the contention of the Crown. To accept the contention of the Crown, it seems to me, you have got to read something in Section 4 which is not there and to bring that section in conformity with the corresponding provisions under the English law. The English Act does not deal with the location of the income and thus differs from the law here. In this view I do not propose to refer to the cases cited under the English or Colonial law.

Undoubtedly the question which is raised is not free from difficulty, and the present case is on the border line. I am not prepared to deny that there is considerable force in the view which the Crown wants us to take. It seems to me that when the position is such that either one or the other view is equally possible when construing a taxing statute, the principle laid down by Pollock, C. B., in *The Dock Company at Kingston-upon-Hull* v. *Browne*, namely, the subject is not to be taxed unless the language of the statute clearly imposes the obligation, should be followed. For these reasons, I think the questions must be answered in the manner proposed by my Lord the Chief Justice.

Answered accordingly.

[IN THE PRIVY COUNCIL.]

COMMISSIONER OF INCOME TAX, MADRAS
v.
THE BUCKINGHAM & CARNATIC COMPANY, LIMITED, MADRAS.

Lord Thankerton, Sir Lancelot Sanderson and Sir George Rankin.

October 25, 1935.

ALLOWANCES—DEPRECIATION OF BUILDINGS AND MACHINERY—TRANSFER OF BUILDINGS AND MACHINERY—DEPRECIATION, WHETHER TO BE CALCULATED ON ORIGINAL COST TO PURCHASER —INDIAN INCOME TAX ACT (XI OF 1922), SECTION 10 (2) (VI).

The word 'assessee' in Section 10 (2) (vi) of the Indian Income Tax Act refers to the person who owns the property in question and who is being assessed, and depreciation allowance is to be based on the original cost of such property to such person. Therefore, where buildings or machinery have been acquired by one person from another the original cost which is to be considered for the purpose of calculating depreciation allowance is the original cost to the purchaser who is being assessed and not to his predecessor.

The assessee company acquired the businesses of five other companies and took over the buildings and machinery of the latter. The total cost of the buildings and machinery to the said five companies was about Rs. 91 lakhs, but they were taken over by the assessee company at their written down value on the date of purchase, which was about Rs. 34 lakhs: Held, *by the Privy Council reversing the decision of the Madras High Court, that depreciation allowances on the buildings and machinery taken over by the assessee company must be calculated on the value at which they were taken over by the assessee company, namely, Rs. 34 lakhs and not upon the original cost of the buildings and machinery to the five companies from which the assessee company had taken them over.*

MASSEY & CO., LTD. *v.* COMMISSIONER OF INCOME TAX, MADRAS [1929] (115 I. C. 814; 56 M. L. J. 451; 3 I. T. C. 302; A. I. R. 1929 Mad. 453) *overruled.*

COMMISSIONER OF INCOME TAX, BOMBAY *v.* SARASPUR MILLS CO., LTD. [1932] (I. L. R. 56 Bom. 129; 137 I. C. 898; 34 Bom. L. R. 104) *and* MOTIRAM ROSHANLAL COAL CO., LTD. *v.* COMMISSIONER OF INCOME TAX, BIHAR & ORISSA [1933] (I. L. R. 12 Pat. 12; 140 I. C. 904; 30 P. L. T. 613; 1933 I. T. R. 329) *approved.*

Appeal from a judgment and order from the High Court of Judicature at Madras, dated May 2, 1934. The facts appear from the following judgment of the Madras High Court:—

"The first question referred to us by the Income Tax Commissioner is "whether the Buckingham and Carnatic Company, Limited which succeeded to the business of the Buckingham Mill Company, Limited, the Carnatic Mill Company, Limited, the Jamalamadugu Press Company, Limited, the Tiruppur Press Company, Limited and the Tadpatri Cotton Press Company, Limited, is entitled, under Section 10 (2) (vi) of the Act, to depreciation allowance on the assets taken over from the five predecessor companies calculated on the original cost of these assets to such predecessor companies or on the value at which these assets where taken over by the Buckingham and Carnatic Company, Limited from the predecessor companies." As is stated in the question referred the petitioner company took over the businesses of five other companies. This they did in November 1920. The total cost of the buildings and machinery to the predecessor companies was:

	Rs.
Dyeing and finishing machinery ...	11,11,748
Other machinery	54,26,856
Buildings	25,73,603

But the petitioner company did not take over the machinery and buildings at their actual cost to the predecessor companies but at their written down value as on the 30th November 1920 which was as follows:

	Rs.
Dyeing and finishing machinery ...	3,88,797
Other machinery	15,10,845
Buildings	15,55,737

In the year subsequent to the amalgamation, *i.e.*, in 1921-22 the petitioner company was assessed on the entire profits of the five predecessor companies as having succeeded to their business. During its assessment for 1922-23, the company claimed to deduct depreciation on the machinery and buildings calculated on their original cost to the five predecessor companies. This claim was disallowed and depreciation calculated on the written down cost (or original cost to the petitioner company) only was allowed. From this year onwards the company claimed and was allowed depreciation calculated on the written down cost plus the additions made each year. In the course of the assessment for 1931-32 (year of account—Calendar year 1930) the company proposed to amend its original claim for depreciation as before mentioned on the ground that as it had succeeded to the business of

ambiguity in the words referred to, then the most favourable construction to the petitioner company should be given to them. In my view, when that sub-section came to be enacted, the legislature were not envisaging any case of a successor company. What was in their mind was the original company. In my view, the successor company should not be placed in a more disadvantageous position than the company to whose business it succeeds. That company is allowed under Clause (i) to the sub-section in question an allowance for depreciation which in the aggregate may be equal to but must not exceed the original cost to the assessee of the buildings, machinery, plant etc. When the successor company succeeds to the business I see no reason whatever why in justice it should be deprived of any part of such aggregate allowance which it clearly is if the view taken by the Income Tax Commissioner is correct. Moreover if correct in the case of a company which suffers a number of subsequent transfers, the original cost would be a constantly fluctuating figure. In my opinion, it has not been shown that the decision in *Massey's case* was not correct. It follows, therefore, that the first question referred must be answered in a similar manner.

With regard to the second question, it is not here contended by the petitioner company that a refund can be claimed but it is contended that they are entitled to the aggregate depreciation allowance based upon the original cost to the predecessor companies. Following the decision in *Massey's case* this contention is, in my opinion, correct and that question must therefore be answered accordingly.

With regard to question 3, this upon the words of sub-section, following *Massey's case* is quite clear. The petitioner company are entitled to an allowance for depreciation based upon a percentage on the original cost of the buildings to the predecessor companies.

It is conceded that the answer to question No. 4 must be in the affirmative.

The petitioner company will get Rs. 250 costs from the Commissioner of Income Tax."

The Commissioner of Income Tax appealed.

A. M. Dunne and *K. C. Hubert Hull*, for the appellants.

R. P. Hills, for the respondent.

The Judgment of the Judicial Committee was delivered by

SIR LANCELOT SANDERSON.—This is an appeal by the Commissioner of Income Tax from a judgment and order of the High Court of Judicature at Madras dated May 2, 1934, whereby the High Court, upon the hearing of a case referred to it by the appellant under the provisions of the Indian Income Tax Act, 1922

(XI of 1922), answered certain questions of law raised thereby adversely to the contentions of the appellant.

The questions of law referred to the High Court arose in the course of the assessment of the profits and gains of the business of the respondent company of the tax year beginning on April 1, 1931.

The main question arising for determination in this appeal is whether the allowance to be made to the respondent company in respect of depreciation of buildings and machinery used by them for the purposes of their business should be calculated by reference to the cost thereof to the respondent company or by reference to the original cost thereof to certain companies from which such buildings and machinery were acquired by the respondent company.

The material facts, as stated in the case which the Commissioner of Income Tax referred for the opinion of the High Court under Section 66 (1) of the said Act are as follows:

The Buckingham and Carnatic Company, Limited (hereinafter referred to as "the company") is a public limited company which was incorporated on November 29, 1920 under the Indian Companies Act, 1913.

The objects of the company were to acquire, take over, amalgamate with, work and carry on the business hitherto carried on in Madras and elsewhere by five limited companies which were registered under the Indian Companies Act and the goodwill of the said business, to enter into and carry into effect an agreement which had been prepared and was expressed to be made between the said five companies, their liquidators and the company, to carry on the business so to be acquired and generally to carry on the business of cotton spinners.

The said five companies were incorporated on various dates ranging from 1876 to 1888.

The above-mentioned agreement was entered into on December 3, 1920.

The total cost of the buildings and machinery to the said five companies was as follows:—

		Rupees.
Dyeing and finishing machinery	...	11,11,748
Other machinery	...	54,26,856
Buildings	...	25,73,603

The buildings and machinery were not taken over by the company at the actual cost thereof to the said five companies, but

at their written down value on November 30, 1920, which was as follows:—

		Rupees.
Dyeing and finishing machinery	...	3,88,797
Other machinery	...	15,12,845
Buildings	...	15,55,737

In the year subsequent to the amalgamation, *i.e.*, in 1921-1922 the company was assessed on the entire profits of the said five companies as having succeeded to their business

During the assessment the company claimed to deduct depreciation on the buildings and machinery calculated on the original cost thereof to the said five companies.

This claim was disallowed and depreciation, calculated on the written down cost, *viz.*, the actual cost, to the company, only was allowed.

From that year onwards the company claimed and was allowed depreciation in respect of the buildings and machinery calculated on the said written down cost plus depreciation in respect of any additions made to the buildings and machinery by the company in each year.

In the course of the assessment for 1931-32 the company again claimed depreciation as above on the ground that as it had succeeded to the business of the said five companies it was entitled to depreciation on the buildings and machinery which had been taken over from the said companies calculated on the original cost thereof to the said five companies.

This claim was based on a decision of the Madras High Court, *viz.*, *Massey & Co., Ltd.* v. *Commissioner of Income Tax, Madras* which was given on November 29, 1928. The case is reported in *Massey & Co., Ltd.* v. *The Commissioner of Income Tax, Madras* (56 M.L.J. 451; 3 I.T.C. 302).

It appears, however, that the High Courts of Bombay and Patna had declined to follow the Madras decision.

In view of the conflicting decisions the Assistant Commissioner of Income Tax referred the matter to the Commissioner of Income Tax, Madras, the appellant in this appeal.

The appellant as already stated referred the case to the High Court. The first question submitted in the case for the opinion of the High Court was as follows:—

Question 1—"Whether the Buckingham and Carnatic Company, Limited, which succeeded to the business of the Buckingham Mill Company, Limited, the Carnatic Mill

Company, Limited, the Jamalmadugu Press Company, Limited, the Tiruppur Press Company, Limited and the Tadpatri Cotton Press Company, Limited, is entitled under Section 10 (2) (*vi*) of the Act, to depreciation allowance on the assets taken over from the five predecessor companies calculated on the original cost of these assets to such predecessor companies or on the value at which these assets were taken over by the Buckingham and Carnatic Company, Limited, from the predecessor companies?"

The appellant agreed with the decisions of the Bombay and Patna High Court and expressed the opinion that the allowance to be made in respect of depreciation of the assets acquired from the predecessor companies by the company should be calculated by reference to the value at which such assets were acquired by the company.

The appellant proceeded to refer three other questions, which he considered would arise in the event of High Court adhering to the decision in *Massey & Co., Ltd.* v. *Commissioner of Income Tax, Madras*. The said three questions were as follows:—

"Question 2.—Whether the Buckingham and Carnatic Company Limited, is entitled to have the depreciation allowance from the year 1921-1922 to 1930-1931 recalculated on the basis of that decision and to claim that the excess depreciation not allowed in those years should be allowed in its subsequent assessment or whether the claim for such excess depreciation lapses altogether?

Question 3.—Whether the Buckingham and Carnatic Company Limited, is entitled to claim depreciation on buildings taken over from the predecessor companies in its subsequent assessment at the rates in force each year till the total of such allowances to the company and its predecessors is equal to the original cost of these buildings to the predecessor companies or whether the company should be allowed to claim depreciation on these buildings in each of its subsequent assessments at the rates in force each year only for a period not exceeding the life of the asset fixed under the present Act, calculated from the date on which they were first brought into use by the predecessor companies?

Question 4.—In calculating the amount of depreciation allowable in subsequent years to the Buckingham and Carnatic Company, Limited, is the amount allowed to the predecessor campanies to be taken into account in applying Section 10 (2) (*vi*) proviso (*c*) of the Act"?

The High Court held that it had not been shown that the decision is *Massey's case* was incorrect answered the questions as follows:—

(1) That the respondent company herein is entitled to depreciation allowance on the machinery and buildings taken over, calculated on the original cost of these assets to the aforesaid five predecessor companies.

(2) That the respondent company is entitled to the aggregate depreciation allowance based upon the original cost to the aforesaid predecessor companies.

(3) That the respondent company are entitled to an allowance for depreciation based upon a percentage on the original cost of the buildings to the predecessor companies.

(4) In calculating the amount of depreciation allowable in subsequent years to the Buckingham and Carnatic Company, Limited, the amount allowed to the predecessor company shall be taken into account in applying Section 10 (2) (*vi*) proviso (*c*) of the Act.

The main question is the first. The section of the Indian Income Tax Act, 1922, which relates to this question is Section 10, and the material part thereof is as follows :—

10.—(1) The tax shall be payable by an assessee under the head "Business" in respect of the profits or gains of any business carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely :—

(*vi*) in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed :

Provided that—

(*b*) where full effect cannot be given to any such allowance, in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, the allowance or part of the allowance to which effect has not been given as the case may be, shall be added to the amount of the allowance, for depreciation for the following year and deemed to be part of that allowance or, if there is no such allowance for that year, be deemed to be the allowance for that year and so on for succeeding years ; and

(*c*) the aggregate of all such allowances made under this Act or any Act repealed hereby or under the Indian Income Tax Act, 1886, shall, in no case exceed the original cost to the assessee of the buildings, machinery, plant, or furniture, as the case may be.

By Section 2 (2) of the said Act, "assessee" means a person by whom income-tax is payable. By Section 2 (10) "prescribed" means prescribed by rules made under this Act.

No question arises in this appeal as regards the percentage prescribed by the rules.

The answer to the first question in this appeal depends upon the construction, which is to be put upon the words in the Section 10 (2) (*vi*) : "the original cost thereof to the assessee."

The High Court of Madras were of opinion that the other High Courts had stressed the importance of the words "to the assessee", and had not given sufficient importance to the words "original cost", and that as there was an ambiguity the most favourable construction to the company should be given to the words.

The learned Judges expressed the further opinion that the Legislature was not envisaging any case of a successor company, and that what was in mind was the original company.

The case for the company at the hearing before the Board was put in rather a different way. It was contended on the company's behalf that the meaning of the above mentioned material words was "the original cost thereof to the assessee for the time being" or "the original cost thereof to the assessee at the time of the original cost".

Their Lordships are not able to accept the construction of the material words adopted by the High Court, or that which was presented on behalf of the company before the Board. Both the above-mentioned constructions involve the insertion in the sub-section of words which are not to be found therein, and are not in the least necessary for an intelligible construction thereof: a method of construction to which their Lordships can give no countenance.

They are of opinion that there is no ambiguity in the provisions of Section 10 (2) (*vi*), and the ordinary and natural meaning of the words used must be taken as the proper construction.

The sub-section provides for the allowance in respect of depreciation of buildings and machinery, which are the property of the assessee, to the extent of the percentage prescribed on the original cost thereof to the assessee. The word "assessee" is used in the sub-section in two places: firstly with regard to the ownership of the property and secondly with regard to the original cost thereof.

In the ordinary and natural meaning of the sub-Section the word "assessee" used in the two connections must refer to the same person. Who then is that person? The answer is given by the sub section itself, namely, the person who owns the property in question and who is being assessed and the depreciation is to be based on the original cost of such property to such person, *viz.*, in this case the company. If there were any doubt about this being the correct interpretation it would be removed by reference to the definition of "assessee" contained in Section 2 (2) of the Act. The word means the person by whom income tax is payable, in this case the company.

It follows, therefore, that the cost which is to be considered for the purpose of the allowance for depreciation must be the original

cost to the person by whom the income tax is payable, in this case the company.

In the case of *Massey & Co., Ltd.* v. *Commissioner of Income Tax, Madras*, three questions were submitted for the High Court's opinion. The third was as to "*res judicata*" to which no further reference need be made. The first two were as follows :—

"(1). Whether Massey & Company, Limited, who succeeded to the business of the Madras Engineering Works, Limited, are entitled to carry forward for the purposes of assessment depreciation to which full effect could not be given in the years previous to the succession by Massey and Company, Limited."

"(2) Whether Messrs. Massey and Company, Limited, can be allowed to calculate depreciation on assets taken over from the Madras Engineering Works, Limited, on the original cost of those assets to the latter, or at the value at which they were taken over by Messrs. Massey & Company, Limited."

The High Court for reasons stated in the judgment of the Chief Justice held that the answer to the first question should be in the affirmative.

The answer to the above mentioned second question was that the calculation must be made on the original cost to the Madras Engineering Company and not on the value at which the buildings, machinery, etc., were taken over by Massey and Co. It should be noted that no reasons for the decision with reference to the second question were given.

In their Lordships' opinion it is not necessary to express, and they do not express any opinion as to the correctness of the answer to the first question in the abovementioned case, but they feel obliged to say that for the reasons which have been already given, they cannot agree with the answer which the Madras High Court gave to the second question.

In the case of the *Commissioner of Income Tax, Bombay Presidency* v. *Saraspur Mills Co., Ahmedabad* the High Court of Bombay refused to follow the decision of the Madras High Court in *Massey & Co., Ltd.* v. *Commissioner of Income Tax, Madras* and held that

"(1) When an assessee succeeds another in business the words " on the original cost thereof to the assessee " in Section 10 (2) (*vi*) of the Indian Income Tax Act, 1922, refer to the original cost to the person who is being actually assessed and not to the previous owner of the business."

"(2) Consequently assessees are entitled to have the depreciation allowance under the said Section 10 (2) (*vi*) of the said Act

calculated on the original cost to them and not to the previous owner from whom they have purchased the business."

In *Motiram Roshan Lal Coal Co., Ltd.* v. *Commissioner of Income Tax* the High Court of Patna approved of and followed the above-mentioned decision of the Bombay High Court, and dissented from the decision of the Madras High Court in *Massey & Co.* v. *Commissioner of Income Tax, Madras.*

For the reasons already stated their Lordships agree with the decisions of the Bombay and Patna High Courts in the above-mentioned cases on the question now under consideration.

In view of that conclusion, it is not necessary for their Lordships to express any opinion on the second, third or fourth questions submitted to the High Court in this case, for, as the Commissioner pointed out in his reference, these questions only arise if it should be held that the decision in the case of *Massey & Co.* v. *Commissioner of Income Tax, Madras*, in respect of the matter raised in the first question was correct.

Their Lordships therefore are of opinion that the appeal should be allowed and the judgment and order of the High Court dated May 2, 1934, should be set aside.

The answer to the first question in the reference should be that the company, which succeeded to the business of the five companies mentioned therein, is entitled under Section 10 (2) (*vi*) of the Act to depreciation allowance on the assets taken over from the five predecessor companies calculated on the value at which those assets were taken over by the company from the predecessor companies, and not upon the original cost of those assets to such predecessor companies.

The company must pay the costs of the appellant in the High Court and of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

Order accordingly.

Solicitors.—The Solicitor, India Office, for the appellant; *Sanderson Lee & Co.*, for the respondent.

[IN THE PRIVY COUNCIL.]

COMMISSIONER OF INCOME TAX, BOMBAY

v.

CURRIMBHOY EBRAHIM & SONS, LTD.

Lord Thankerton, Sir Lancelot Sanderson, and Sir George Rankin.

October 28, 1935.

NON-RESIDENT—LOAN TO PERSON CARRYING ON BUSINESS IN BRITISH INDIA—PAYMENT OF INTEREST TO NON-RESIDENT

OUTSIDE BRITISH INDIA—BORROWER, WHETHER LIABLE TO BE ASSESSED ON SUCH INTEREST AS AGENT OF NON-RESIDENT—'BUSINESS CONNECTION,' 'PROPERTY,' MEANINGS OF—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 42 (1).

The assessee company carried on business in Bombay. They obtained a loan of Rs. 50 lakhs from the Nizam of Hyderabad undertaking to pay interest thereon at Hyderabad and to repay the capital in five years. In the year of account, the assessee company paid to the Imperial Bank at Hyderabad to the credit of the Nizam a sum of Rs. 3 lakhs odd on account of interest due to the Nizam on the loan. The assessee company was treated as the Nizam's agent and assessed under Section 42 (1) on (i) the sum of Rs. 3 lakhs which they had paid to the Nizam, on the ground that the Nizam had earned this amount through a business connection with the assessee in British India, (ii) on the income from the property which the Nizam owned in Bombay. There was nothing to show that the Nizam had any interest in the company except as one of its creditors and there was no evidence of any course of dealings between the parties apart from this loan : Held, *affirming the decision of the Bombay High Court, that the facts were not sufficient to establish any business connection between the assessee company and the Nizam ; the interest earned by the Nizam did not accrue or arise to the Nizam through or from any business connection with the assessee company in British India or from any property within British India ; and the assessee company could not therefore be treated as an agent of the Nizam and assessed to Indian income tax on the said sum of Rupee 3 lakhs under Section 42 (1).*

Held also, *that the assessment of the assessee company to income tax on the income from the property of the Nizam in Bombay with which they had no concern whatever was wholly illegal.*

The word 'property' as used in sub-section (1) of Section 42 means something tangible but it is not confined to immovable property or to buildings or land appertaining thereto. The word is used as an ordinary English word to be taken in its usual signification and there is nothing in the sub-section to exclude from its scope any of the six classes of income mentioned in Section 6 of the Act.

The phrase 'business connection' is different from, though doubtless not unrelated to, the word 'business' of which there is a definition in the Act.

COMMISSIONER OF INCOME TAX *v.* CURRIMBHOY EBRAHIM & SONS, LTD. [1933] (1 I.T.R. 341 : I.L.R. 57 Bom. 615) *affirmed.*

Cases referred to and distinguished.

COMMISSIONER OF INCOME TAX, BOMBAY *v.* BOMBAY TRUST CORPN. [1928] (I.L.R. 52 Bom 702; 3 I.T.C. 135; 112 I.C. 593).

COMMISSIONER OF INCOME TAX, BOMBAY v. BOMBAY TRUST CORPN. LTD. [1930] (I.L.R. 54 Bom. 216; 57 I.A. 49; 4 I.T.C. 312) P.C.

COMMISSIONER OF INCOME TAX, BURMA v. MESSRS. STEEL BROTHERS & CO., LTD. [1926] (I.L.R. 3 RANG. 614; 94 I.C. 466; A.I.R. 1926 Rang. 97).

ROGERS PYATT SHELLAC & CO. v. SECRETARY OF STATE FOR INDIA [1925] (I.L.R. 52 Cal. 1; 83 I.C. 273; 40 C.L.J. 110; 28 C.W.N. 1074).

Appeal against the judgment of BEAUMONT, C.J. and RANGNEKAR, J., in Civil Reference No. 12 of 1932, dated February 28, 1933, reported as 1933, 1 I.T.R. 341.

Gavin Simonds, K. C., and *Wallach*, for the appellant.

A. M. Latter, K. C. and *Sir Thomas Strangman*, for the respondents.

SIR GEORGE RANKIN.—This appeal arises out of an assessment order made by the Income Tax Officer of A Ward, Bombay, on August 7, 1931, against the respondent company Messrs. Currimbhoy Ebrahim & Sons, Limited, as agents of His Exalted Highness the Nizam of Hyderabad. The order was made in respect of income tax for the year of assessment 1931-32, but was based upon the accounting period being the year 1930-31. Two items only were included in the order, first, the sum of Rs. 27,960 being income tax claimed to be due from the Nizam under the head "property" in respect of house property in Bombay of which he is the owner; secondly, a sum of Rs. 3,15,214 being the amount received in the year of account by the Nizam from the respondent company as interest due upon a loan of Rs. 50,00,000 made by the Nizam to the respondent company upon the terms of a written instrument dated August 16, 1929. The latter claim was laid under the heading "Other Sources" as defined by Section 12 of the Act.

This assessment of the respondent company in respect of income tax claimed to be due from the Nizam was based upon proceedings taken under Section 43 of the Indian Income Tax Act (Act XI of 1922) a notice having been issued upon the respondent company to the effect that the Income Tax Officer intended to treat them as agents of the Nizam. Notice having been issued on May 7, 1931, and the respondent company having appeared and objected, the Income Tax Officer on June 5, 1931, made an order in writing holding that a business connection existed between the respondent company and the Nizam, and that the word "property" appearing in Section 42, sub-Section 1 of the Act includes moveable property and investments. The final conclusion of this order was that there was income chargeable to income tax under Section 42 (1) of the Act and that Messrs.

Currimbhoy Ebrahim & Sons, Limited, might be deemed to be the agent of His Exalted Highness the Nizam.

As already mentioned the assessment order of August 7, 1931, included income tax in respect of house property in Bombay. This was property with which the respondent company had nothing whatever to do. It appears from the assessment order itself that it was included, not because income tax under the head "property" had not been paid by the person managing the property, but because the Income Tax Officer considered that income of an assessee from all sources must be included in one assessment, and that there cannot be two or more assessments against one assessee for the different sources of income.

The respondent company appealed from the Assessment Order to the Assistant Commissioner of Income Tax, Bombay, taking objection not only to the claims themselves, but also to the right of the Income Tax Officer to treat them as agents of the Nizam. The appeal was dismissed by the Assistant Commissioner who upheld the findings of the Income Tax Officer under the first sub-section of Section 42 in respect of the interest upon the loan. He also upheld the assessment in respect of the house property, on the ground that it was within the right of the Income Tax Officer to select any agent as the *principal* agent and to bring all items of income into one assessment.

The respondent company thereupon applied under Section 66 of the Act to the Commissioner of Income Tax to make a reference to the High Court of Bombay regarding certain questions of law arising out of the Assessment Order, and by Letter of Reference dated November 30, 1932, the Commissioner submitted five questions formulated by the respondent company. The questions were as follows:—

"(1) Whether the facts of the case constitute a business connection between the applicants and His Exalted Highness the Nizam within the meaning of Section 42 of the Income Tax Act.

"(2) Whether the interest earned by His Exalted Highness the Nizam on the loan made to the applicants constitutes profit or gain accruing or arising to His Exalted Highness the Nizam directly or indirectly through or from any business connection or propety in British India chargeable to income tax in the name of the applicants.

"(3) Whether the assessee can in law be deemed to be agent of His Exalted Highness the Nizam under Section 43 of the Income Tax Act.

"(4) Whether the applicants are liable to be assessed as Agent for His Exalted Highness the Nizam in respect of:—

(*a*) Interest on the loan above referred to,
(*b*) Property income above referred to,

"(5) Whether the assessment levied on the applicant is valid in law."

The opinion of the Commissioner submitted as required by sub-Section 2 of Section 66 of the Act was to the effect that the interest income arose from a business connection in British India within the meaning of Section 42, sub-Section (1). He also found that the respondent company were liable to be deemed the Nizam's agents for all the purposes of the Act by reason of the fact that they had a business connection with the Nizam.

The High Court of Bombay answered all the questions propounded in the negative holding that there was no business connection between the Nizam and the respondent company, that the interest income did not arise to the Nizam through or from any property in British India, and that the respondent company is not hit by Section 43 of the Act either as having any business connection with the Nizam or as being persons through whom the Nizam is in receipt of any income, profits or gains. It is from this decision that the present appeal has been brought to His Majesty in Council by the Commissioner for Income Tax.

The loan in question was a loan of Rs. 50,00,000 and the instrument of agreement in respect thereof was executed in Bombay. Apart from the respondent company who were the borrowers, and the Finance Member of the Government of the Nizam (the 'lender'), there were four other parties to the agreement who joined for the purpose of recording the deposit of title deeds made by them as security for the repayment of the loan by the borrowers. The security consisted both of shares in joint stock companies, and of immovable properties, and the mortgage was a mortgage by deposit effected in the usual manner by blank transfers in the case of shares and by deposit of title deeds in the case of lands. Interest was to be paid at the rate of 7½ per cent. per annum and it was to be paid to the Nizam of Hyderabad through the Imperial Bank of India, Hyderabad Branch. The loan itself was to be re-paid by five annual instalment of Rs. 10,00,000 each, exclusive of interest, such instalments to be paid in like manner in Hyderabad. There was a covenant by the borrowers to keep the mortgaged properties in repair and a provision that in default, the lender should be entitled to repair and to add the cost to the principal debt. By another provision the Nizam was to be entitled to appoint one or more representatives to look after and protect his interests in connection with the securities, and the respondent company was to pay a remuneration to such representative or representatives not exceeding in the aggregate Rs. 6,000 per annum. The respondent company was also to furnish the Nizam in each year with a certified copy of the balance sheet and profit and loss account of their own business. Although nothing turns upon the clause, it may be mentioned that the respondent company agreed to pay income tax if leviable in British India upon

the interest. The actual advance of the Rs. 50,00,000 was made by this sum being paid by the Nizam into the Hyderabad Branch of the Imperial Bank of India on behalf of the respondent company.

It is not the contention of the appellant that the interest income now in question did in fact accrue or arise in British India or was in fact received in British India within the meaning of these words as they appear in sub-Section (1) of Section 4, but it is said that by virtue of the first sub-section of Section 42 this income is *deemed* to be income accruing or arising in British India within the meaning of the concluding words of Section 4. Whether or not the income is to be deemed to accrue or arise in British India and so to be chargeable to income-tax in British India, depends on the two questions: (*a*) Did it accrue or arise to the Nizam through or from any business connection in British India? (*c*) Did it accrue or arise to the Nizam through or from any property in British India? In their Lordships' opinion both of these questions have been correctly answered in the negative by the learned Judges of the High Court of Bombay.

It was contended on behalf of the respondents that the words "business connection" and "property" in Section 42 (1) are intended as repetitions of the expressions "business" and property" appearing in Section 6 to describe "heads of income". and that the interest income now in question, being admittedly taxable under the 6th heading "other sources", cannot be said to accrue or arise through or from any business connection or property in British India within the meaning of the sub-section. In support of this argument their Lordships were referred to certain observations in the case of *Rogers Pyatt Shellac & Co.* v. *Secretary of State for India* and *Commissioner of Income Tax, Burma* v. *Messrs. Steel Brothers & Co., Ltd.* This contention, however, does not appear to their Lordships to be valid. The phrase "business connection" is different from, though doubtless not unrelated to, the word "business" of which there is a definition in the Act. The word "property" when used in Section 6 to describe a head of income is not defined by the statute, but by Section 9 it is provided that under this head tax shall be payable in respect of the *bona fide* annual value of property consisting of any buildings or lands appertaining thereto. In their Lordships' opinion the word "property" as it occurs in the sub-Section (1) of Section 42 cannot be given so special a colour, but is used as an ordinary English word to be taken in its usual signification subject to the context provided by the rest of the sub-section. There is nothing in the sub-section to exclude from its scope any of the six classes of income mentioned in Section 6 of the Act.

Upon the question whether the interest arose to the Nizam through or from any business connection in British India, their Lordships observe that so far as appears from the facts found in the Letter of Reference, the loan made by the Nizam to the

respondent company on August 16, 1929, was an isolated transaction between the parties. It is not shown that the Nizam has at any time had an interest direct or indirect in the respondent company. There is no evidence of a course of dealing between the parties such as might fairly be described as a business connection previously subsisting between them. There is no element in the present case which justifies a comparison on the facts with the position of the parties in the case of *Commissioner of Income Tax, Bombay* v. *Bombay Trust Corporation* and *Commissioner of Income Tax, Bombay* v. *Trust Corporation, Ltd.*

If the words "accruing or arising to such person whether directly or indirectly through or from any business connection in British India" are not to be deemed satisfied in every case in which a single monetary transaction by a non-resident with a resident produces gain to the former, it is difficult to see in the facts of this case any distinguishing element of business connection which the legislature has chosen as the test for rendering chargeable to British Indian income-tax income which has not accrued in British India. There is no proof that the Nizam is carrying on business of moneylending either in Hyderabad or British India. So far as appears, he invested some surplus capital in making a loan to the respondent company taking security therefor. That the respondent company doubtless used the borrowed money in connection with their own business is not a fact which brings the Nizam any nearer to being a person who has business connection in British India. The circumstance that the repayments of the loan are contemplated to extend over a period of five years, and that the interest would be payable from time to time during this period, is equally ineffective to bring the case within the words of sub-Section (1) of Section 42.

Upon the question whether the interest income accrued or arose to the Nizam through or from property in British India, their Lordships agree with the view expressed by the learned Chief Justice of Bombay that the word "property" used in sub-Section (1) of Section 42 means something tangible; though, for reasons already given, they cannot accept his suggestion that it is confined to immoveable property or to buildings or lands appertaining thereto. The phrase to be construed is "property in British India" and it seems to their Lordships that the plain implication is that the property is to be situated in British India. No doubt for purposes of administration or succession, or for purposes of jurisdiction to attach a debt, a chose in action is treated notionally as situated in a particular country or district. The statute however does not intend to import questions of this character as the test whether income which does not accrue within British India shall be deemed so to accrue. In their Lordships' opinion the phrase is to be taken literally and simply. It is applicable for example, in a case where furniture situated in British India has been hired under an agreement whereby the hire is payable outside British India.

In the result, therefore, their Lordships come to the conclusion that the interest income in respect of which the respondent company has been assessed to tax as agent for the Nizam, is not to be deemed to have accrued or arisen within British India at all and is therefore, not liable to tax. The Income Tax Officer's order of June 5, 1931, whereby the respondent company was deemed to be an agent of the Nizam and liable to be made assessee in respect of these monies is without foundation and altogether invalid. In these circumstances it does not appear to their Lordships to be necessary that they should discuss any of the questions raised under Section 43 of the Act. It would indeed be strange if the respondent company as mere debtors to a nonresident paying him outside British India monies which are not assessable to Indian income-tax at all, could be made liable for the income tax due on the non-resident's house property in Bombay with which they had no concern, and this notwithstanding that tax had hitherto been duly assessed upon and paid by the person managing the property on behalf of the non-resident. No such opinion was given by the Commissioner in his Lettter of Reference and no such contention has been raised by learned Counsel for the appellant before this Board. It appears to their Lordships to be sufficient to say that as regards questions (1), (2) and (5) answered by the High Court of Bombay in the negative, their Lordships agree with the High Court, and that their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors—Solicitor, India Office, for the appellant; *T. L. Wilson & Co.,* for the respondents.

[IN THE LAHORE HIGH COURT.]

SHIV NARAIN & SONS

v.

COMMISSIONER OF INCOME TAX, PUNJAB.

Addison and Din Mohammad, JJ.

December 10, 1934.

LOSSES—PARTNERSHIP BETWEEN *A* & *B*—CLAIM TO SET OFF LOSS IN PARTNERSHIP BETWEEN *A*, *B* & *C*—MAINTAINABILITY—ONE FIRM CANNOT BE PARTNER IN ANOTHER FIRM—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 24.

Where four brothers formed a partnership and in the assessment of this partnership, they claimed to set off a loss which they had sufferred in another partnership of which the four brothers and a fifth brother were partners: Held *that inasmuch as a firm could not be a partner in another firm, the firm of the four brothers could*

not be treated as a partner in the firm of the five brothers and that being so, the losses incurred in the firm of five brothers could not be set of against the profits of the firm of the four brothers which was being assessed.

Cases referred to:

BROJO LAL SAHA *v.* BUDH NATH PYARI LAL DAS [1928] (I.L.R. 55 Cal. 551; 105 I.C. 549; A.I.R. 1928 Cal. 148).

JAIDAYAL MADANGOPAL, *In re* [1933] (I.L.R. 54 All. 846; 143 I.C. 390; A.I.R. 1933 All. 77; 1933 I.T.R. 186).

SHEODAYAL KHEMKA *v.* JOHARMULL [1924] (I.L.R. 50 Cal. 549; 75 I C. 81; A.I.R. 1924 Cal. 74).

Reference made by the Commissioner of Income Tax, Punjab under Section 66 (3) of the Income Tax Act [Civil Ref. No. 34 of 1934].

Jai Gopal Sethi, for the assessees.

J. N. Aggarwal, for the Commissioner.

ADDISON, J.—A Bench of this Court directed the Commissioner of Income Tax to state the facts of a particular assessment and refer three questions of law for decision. The Commissioner has, in a lengthy order, set out the facts in great detail and it will not be necessary for us to recapitulate all of them. The first two questions, on the facts stated, scarcely arise, and if it is necessary to give any answers to them, those proposed by the Commissioner may be accepted. The third question put was:

"Are the assessees entitled to set off the loss in the firm Arjan Das Sada Sukh against profits of their other concern?"

As stated by the Commissioner in his order, the case boils down to the contention that if the Khawaja Khera saltpetre profits were included, the Arjan Das Sada Sukh account should be set off.

The assessees are four of the six sons of one Shiv Narain. When their father and two of their brothers separated, these four remained joint and the assessment is upon them alone. They returned the profits from the Khawaja Khera saltpetre factory as being the profits of their concern, and the accounting of them was interwoven in such a way that however they were acquired they must be the exclusive income of these four brothers. In fact, as already stated, they were returned as such. Now, the Arjan Das Sada Sukh firm belongs to these four brothers and a fifth brother Megh Raj. There have been losses in it and the four brothers wished to set off their losses on that account against profits returned as theirs in the other account. Their case was that their mother gave them a four-fifths share in the Arjan Das Sada Sukh business and gave Megh Raj a one fifth share. The evidence produced before the income tax authorities was *ad hoc* evidence which was not

believed. This is a finding of fact, if there was material before them for coming to that decision. There is no doubt that there was such material and the reply to question 3 must therefore be in the negative.

Further, it was held in *Sheodayal Khemka* v. *Joharmull*, that a partnership firm was not a person but was merely a collective name for the indivuals who were members of the partnership, and, as such, could not be a partner in another firm. Again, in *Brojo Lal Saha* v. *Budh Nath Pyari Lal Das*, it was held that a firm was not a person; it was not a legal entity: it was merely a collective name for the individuals who were members of the partnership. A similar view was taken in *In re Jai Dayal Madan Gopal*. The partnership firm of the four brothers therefore cannot claim that their partnership firm as such is a partner in the Arjan Das Sada Sukh concern. The brothers, as individuals, are undoubtedly partners, but the partnership firm under assessment cannot be held to be a partner in it. This being the case, there can be no set off of the Arjan Das Sada Sukh losses against the profits of the partnership of the four brothers.

This disposes of the reference. We allow the Commissioner of Income Tax his costs.

Reference answered accordingly.

[In the Lahore High Court.]

MAJOR CONVILLE

v.

COMMISSIONER OF INCOME TAX, PUNJAB and N. W. F. P.

Addison, Ag. C.J. and Din Mohammad, J.

July 11, 1935.

Agricultural Income—Co-owners—Agreement for Management of Estate—Stipulation to Pay Allowance to One Co-sharer and to Divide Balance in Certain Shares—Allowance Paid to Managing Co-sharer Whether Salary or Agricultural Income—Income Tax Act (XI of 1922), Section 4 (3) (viii), 7 and 14 (2) (b).

The assessee and his father held definite shares in an estate. They entered into an agreement by which the assessee was to reside in the estate and manage it under the directions of his father, the father was to pay him (the assessee) a monthly allowance and the net income after deducing the expenses and the allowances was to be divided between the father and the son in certain shares. Income tax department assessed the whole of the allowance received by the assessee under this agreement as salary while the assessee claimed that the

entire amount received by him was agricultural income and exempt from tax. On a reference by the Commissioner of Income Tax:

Held, *that the assessee was entitled to treat that part of his income as agricultural income which he received as of right by virtue of the ownership of his share and the excess received by him was assessable by the income tax authorities as salary in his hands.*

Held further, *that it was open to the income tax authorities to find that a portion of the allowance made to the assessee was salary and it was immaterial for this purpose whether the assessee and his father were partners or co-owners in the eye of law.*

Even a co-owner can employ another co-owner on the business of the joint ownership and similarly a partner can employ another partner on the business of a firm and whatever the position may be, the latter is an employee of the former qua *that portion of the work which he does for the former and for which he is paid an extra amount.*

Reference made by the Commissioner of Income Tax, Punjab and N.W.F.P. under Section 66 (2) of the Income Tax Act. Civil Reference No. 27 of 1935.

Badri Das and *Radha Krishnan*, for the petitioner.

J. N. Aggarwal and *Sarv Mitter Sikri*, for the opposite party.

Din Mohammad, J.—This is a reference under Section 66(2), Income Tax Act. The assessee is Major L. H. G. Conville who along with his sister holds a definite share in the lease of land granted by government to his father, Mr. H.T. Conville. For the management of this estate and the distribution of its income, the three lessees had entered into an arrangement among themselves, which has given rise to this reference. The questions of law formulated by the Commissioner at the instance of the assessee are: (1) Was there material on which the Income Tax Officer could find that the payment of monthly allowance to the assessee, in terms of the deed of partnership between himself and Mr. H. T. Conville was salary paid by the firm to the assessee? (2) Was the said payment in any event exempt from tax under Section 4 (3) (viii) read with Section 2 (1), or Section 14 (2) (*b*) of the Act, or under any other provision of law?

The deed of partnership referred to in question (1) is appended to the statement of the Commissioner. It was executed on the 5th of February 1930 in supercession of the previous deed of 25th April, 1923 which again had replaced a former deed of 23rd April, 1922. The shares of the three executants of the deed have been specified therein as under: H. T. Conville, 6/10; Captain L. H. G. Conville, 3/10; Mrs. S. L. Jones, 1/10.

It is further stated there that Mrs. S. L. Jones had leased out her share to her father and brother by a separate deed. As between

the father and the son it is agreed that the management of the estate shall vest in the father, that the son shall reside on the estate and manage it under the directions of this father, that the father shall have an absolute right to fix his own as well as his son's allowance which however will range between Rs. 1,000 and Rs. 2,000 per mensem that the son shall be entitled to receive his allowance only if he actually resides there, that the father shall not be bound to reside there permanently and that after deducting all expenses including the allowances mentioned above the net income shall be divided between the father and the son in the proportion of two-thirds to one-third respectively.

The income tax department assessed the whole of the allowances to tax as salary within the meaning of Section 7 of the Act, while the assessee claimed exemption for the entire amount under Section 4 (3) (viii) read with Section 2 (1) or Section 14 (2) (*b*). Hence this reference. Section 2 (1) defines "agricultural income". Section 4 (3) (viii) removes agricultural income from the operation of the Income Tax Act. Section 7 describes the term "salaries" as used in the Act and Section 14 (2) (*b*) exempts from tax such an amount of profits or gains of any firm which has been assessed to income tax as is proportionate to his share in the firm at the time of such assessment.

From the above analysis of the sections which have been referred to in the case stated by the Commissioner, it would appear that the assessee contends that the entire income received by him falls under the category of "agricultural income" and cannot be thus brought under the Income Tax Act. Failing that he claims exemption for that portion of the income which can be so described and offers only that part of his income for assessment which is over and above his legitimate share. The department, on the other hand, maintains that the deed of partnership entered into between the father and the son has converted the nature of the income realised and the whole of the amount received by the assessee, as the managing partner of the firm, represents the remuneration he receives for the amount of time, labour or skill spent by him.

We may say at once that the position maintained by the Department is altogether untenable. If this were so, a wide door for fraud or evasion of tax will be opened. Every firm will be tempted to fritter away its profits in the shape of salaries to its partners and there will be nothing left for the department to tax in the hands of the firm itself. Moreover, it will lay an unnecessary embarga on well organised management of vast estates. If agricultural income will run the risk of losing its character merely because those who are entitled to receive it, do not receive it in its crude form, *i.e.*, direct from the cultivators, no owners of large estate will attempt to introduce reforms in the management of their lands on modern lines.

In our view the alternative contention raised by the assessee is quite legal. Partnership or no partnership, he is entitled to treat that part of his income as agricultural which he receives as of right by virtue of the ownership of his share. It is only the surplus which can be treated as his salary and hence taxable in his hands. Section 7 merely describes what the term "salary" connotes under the Income Tax Act, but it does not define the word itself. In Stroud's Judicial Dictionary "salary," is defined as follows:

"Salary" signifies a recompense or consideration given unto any man for his pains bestowed upon another man's business."

The deed of partnership makes it clear that the assessee receives the excess for managing his father's share of the estate and for imposing upon himself the condition of permanent residence on the estate with a view to relieve his father of the necessity of so residing. This excess is no doubt salary. It is a recompense to him for his self-imposed trouble which he takes in the interests of his father; or, in other words, in the terms of Stroud for the pains he bestows upon his father's business. His father may have been obliged to engage a stranger for the management of his part of the estate, had his son not agreed to do so and what he would have paid to a stranger, he now pays to his son for the services rendered to him. This surplus payment is over and above the ordinary share of the income which his son is otherwise entitled to receive and is to all intents and purposes not agricultural income in his hands.

In this view of the case it is unnecessary to determine whether in spite of the partnership deed the father and the son can be treated as mere co-owners, as urged by the assessee, or whether on account of this partnership deed they have lost this character and are members of a firm and nothing else. Even a co-owner can employ another co-owner on the business of the joint ownership, and similarly a partner can be employed by another partner on the business of the firm. Whatever his position may be, the son is an employee of his father *qua* that portion of the work which he does exclusively for his father and for which he is paid an extra amount.

The questions formulated by the Commissioner are not very happily worded. The case for the assessee does not appear to have been properly presented to him. We know of no law which makes it incumbent to treat the entire amount of salary received by a partner as his individual income, nor as explained above, is it impossible for a part of an agricultural income earned by one co-owner and paid to another to cease to retain its original character. This aspect of case should have been expressly raised before the Commissioner to enable him to formulate exhaustive questions. But as the Commissioner has himself made a complete statement of the entire case for the assessee and has also referred to Section 14 (2), we consider that we can dispose of the matter before us on the record as it stands.

In view of the above discussion, we answer the two questions referred by the Commissioner in the following modified form: (1) There was sufficient material on which the Income Tax Officer could find that a part of the payment of monthly allowance to the assessee was "salary", whether it was paid by the firm to the assessee or by a co-owner to another co-owner. (2) The payment made to the assessee is exempt only so far as it represents his due share of the income as the holder of a definite share of the lease and no further.

Reference answered accordingly.

[IN THE CALCUTTA HIGH COURT.]

B. N. ELIAS AND OTHERS, *In re.*

Sir Harold Derbyshire, C. J. and Costello, J.

July 11, 1935.

INCOME TAX—'ASSOCIATION OF INDIVIDUALS,' MEANING OF—PROPERTY TAX—JOINT OWNERS HOLDING PROPERTY AS TENANTS IN COMMON AND EXECUTING POWER OF ATTORNEY TO SAME PERSON FOR MANAGEMENT—WHETHER LIABLE TO BE ASSESSED AS AN 'ASSOCIATION OF INDIVIDUALS'—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 3, 9, AND 55.

A certain property called the Norton Buildings was purchased by A, B, C *and* D *in 1920 and their respective shares in the property purchased were 1/3, 1/6, 1 6 and 1/3. In the sale deed these four individuals were described as the purchasers and the purchasers were to have and to hold the said premises absolutely and for ever as tenants in common in the above-mentioned shares.* A, B, *and* C *subsequently executed a joint power of attorney in favour of* D *to manage all their affairs in relation to the above-mentioned property and other properties belonging to them, and* D *continued to manage these properties till the year 1933. In the year 1933-34* A, B, C *and* D *were assessed to income tax and super tax on the income derived from the Norton Buildings as an association of individuals. The assessees contended that they did not constitute an association of individuals and could be taxed only as co-owners*:

Held, *on a reference by the Commissioner of Income Tax, that under these circumstances* A ,B, C *and* D *constituted an association of individuals within the meaning of the Indian Income Tax Act and were rightly assessed as such.*

Case referred to:

SMITH *v.* ANDERSON (15 Ch. 247).

Reference made by the Commissioner of Income Tax, Bengal, under Section 66 (2) of the Indian Income Tax Act.

(Reference No. 2 of 1935).

S. N. Banerjee, for the assessees.

Dr. R. B. Pal, for the Commissioner of Income Tax.

STATEMENT OF CASE.

"This statement of case arises out of the assessment made for the year 1933-34 on the applicants as an association of individuals on an income of Rs. 68,209 as the joint owners of a house property in Calcutta, known as Norton Buildings.

2. The property was acquired by a deed of conveyance, dated the 9th January, 1920, a copy of which is appended to the statement and marked (A), the purchasers being Rachael Bekhor, Captain E. V. Sasson, A. J. Raymond and B. N. Elias and their respective shares in the property purchased were one third, one sixth, and one third. By a subsequent deed, dated the 15th September, 1922, a copy of which is appended and marked (B), Rachael Bekhor set forth that whereas her share of the cost of the said building has been provided by B. S. Benjamin and her share in the property was conveyed to her in Trust for the said Benjamin, she undertook to convey the said property or any part thereof to such person or persons as the said Benjamin might direct and Benjamin is now the owner of the one-third share originally belonging to Rachael Bekhor. By another deed of 1920, a copy of which is appended and marked (C) the three other joint owners, that is, Capt. E. V. Sassoon, Rachael Bekhor and A. J. Raymond appointed B. N. Elias their Attorney for the purpose of managing this property, collecting rents and doing generally on their behalf all such acts in or about the premises as they themselves could or might do if personally present and by a subsequent deed dated 14th January, 1924, a copy of which is appended and marked (D), B. S. Benjamin gave a similar power to the said Elias.

3. The Income Tax Officer in these circumstances made an assessment on these four persons as an Association of Individuals in respect of the income derived from this property in the previous year. The assessee's contention before that officer as well as before the Assistant Commissioner on appeal and before me in his application under section 66 (2) of the Act is that individual assessments should have been made on the owners of this property separately and the question on which I have been asked to state a case to the High Court is formulated by the assessee as below :—

"Whether in view of the circumstances of the case the petitioners were legally treated as an Association of Individuals and whether the joint assessment on them has been rightly made?"

Instead of referring the question in the form raised, I think it would be better to dissect the issue and to formulate three questions and these may be stated as follows :—

(1) Whether in view of the circumstances of this case the petitioners constituted an association of individuals within the meaning of Section 3 of the Indian Income Tax Act?

(2) Assuming that they constituted such an association of individuals, whether in the circumstances of this case the said association can be said to be the owner of the property within the meaning of Section 9 of Income Tax Act?

(3) If such an association of individuals cannot be treated as owners of the property, whether the said association can be assessed under Section 12 of the Income Tax Act in respect of the income derived from the property in question?

COMMISSIONER'S OPINION

4. Section 3 of the Income Tax Act makes "all income, profits and gains......of every individual, Hindu undivided family, company, firm and other association of individuals" chargeable to income tax. The expression "association of individuals" however has nowhere been defined. Admittedly, 'Hindu undivided family' "Company" and "Firm" are also associations of individuals and it would appear that the Legislature after specially referring to the specific instances of associations intended to include all other classes of combinations in the residuary expression "other association of individuals". The specific cases were specially referred to and provided for as these forms of associations are of frequent occurrence and any combination of individuals other than those specified by the three preceding expressions would thus be included in the expression "other association of individuals". It may be argued that the word "other" should be taken as indicating that associations *ejusdem generis* only are intended by the expression but as the three preceding forms of association named in the section do not possess any common characteristic, the difficulty remains unsolved even if we try to interpret its meaning in that light. The association of a Hindu undivided family arises from status and not from contract, while a firm arises from contract and not from status and further while a company is an entity having a legal existence as distinct from the individual members of the company, this is not the case with the other two forms of associations referred to. In my view, therefore, the expression 'other association of individuals cannot be limited in its meaning either only to such associations as are the result of some contract between its individual members or to those associations where the combination results in creating a distinct and separate legal entity. In my respectful opinion, the expression would mean and include a combination of individuals for some common purpose. The convenient, more efficient and more profitable management of property would certainly be a purpose for which such a combination could exist so as to fall within the expression used. To put the case in another way, an association of individuals is the relation between two persons who have agreed to share the income or profits of the

property acquired and managed by all or any one or more of them on behalf of all or of any thing other than business done by them. In this view, the expression 'association of individuals' would be taken as *ejusdem generis* with firm and will give the narrowest possible meaning to the expression, but even so, the present assessee will fall within the expression as thus interpreted. That the assessee is a combination of persons for some common purpose of earning income admits of no doubt. The persons concerned have combined for the convenient, more efficient and more profitable management of their property and in the present case, there is an actual written agreement between the members of the combination to share the profits or income of the property to be managed in the manner agreed upon. In my respectful opinion, therefore, the assessee is an association of individuals within the meaning of Section 3 of the Income Tax Act.

4. (*a*) I think the judgment of the Privy Council in the *Pondicherry Railway Company's case* (5 I.T.C. 363) is relevant in this case. Their Lordships there observed as follows:—

"But profits on their coming into existence attract tax at that point and the revenue is not concerned with the subsequent application of the profits."

In this case, the income comes into existence as soon as the rents are received and expenses defrayed therefrom and the balance is income and, as soon as this balance is ascertained, it attracts tax and its subsequent disposal by distribution among the four partners who jointly own the property is no concern of this department.

5. Under Section 9 (1) of the Act, tax is payable by an assessee under the head, 'property' in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner and in my view, the association in this case is the owner of the property with which we are concerned within the meaning of that section and subsection. It may be true that the individual members of the association like individual partners in a firm, have their share specified but this does not prevent the property from being the property of the association so long as that association continues under the present arrangement.

6. Even if the association cannot be treated as the owner of the property, the income derived therefrom will be assessable under the residuary Section 12. If the association is not the owner of the property, the income derived therefrom will not fall within section 9 of the Act read with Section 6 (iii), but in that case it will fall under Section 6 (vi) and would have to be assessed under Section 12 of the Act.

JUDGMENT.

DERBYSHIRE, C. J.—This matter arises out of a statement of case under the Indian Income Tax Act, 1922, Section 66, by the Commissioner of Income Tax of Bengal. For the year of assessment 1933-34, the Income Tax Officer, for District III (1) made an assessment in respect of certain property in Calcutta, called the Norton Buildings. In the assessment the name of the assessee was stated to be B. N. Elias for self and for B. S. Benjamin, Sir Victor Sassoon and A. J. Raymond, 19-D, Bowbazaar Street. Status (whether individual, registered or unregistered firm, Hindu undivided family, company or other association of individuals). Association of individuals. Sources of income with exact nature of business—House property. It was stated that the members of the association have the following interest. B. N. Elias—One-third, B. S. Benjamin—One-third, Sir Victor Sassoon—One-sixth and A. J. Raymond—One-sixth. The income returned was Rs. 68,209. On that the aforesaid individuals were charged to tax as follows: Income Tax—Rs. 8,881-6; Surcharge on income tax Rs. 2,220 6-0; Super Tax—Rs. 2,360-1-0; surcharge on super tax—Rs. 590 in all Rs. 14,051-13-0. It is said by the assessees that this assessment is wrong, because it assesses them as an "association of individuals" and thus exposes them to a higher rate, and a higher amount of both income tax and super tax.

The history of the ownership of this property, as far as it is relevant in this case, is as follows. By a deed of conveyance, dated the 9th January, 1920, this property was purchased by Rachael Bekhor, Captain E. V. Sassoon, A. J. Raymond and B. N. Elias, and their respective shares in the property purchased were one-third, one sixth, one-sixth, and one third. In the deed of purchase those four individuals were described as the purchasers. The deed says "the purchasers, which expression shall, unless excluded by or repugnant to the context include them and each of them and their and each of their heirs, executors, administrators, representatives and assigns of the third part." The deed also recites that the purchasers were" to have and to hold the said premises......... absolutely and " for ever as tenants in common in the following shares or proportions." The proportions have been set out above.

On the 15th September, 1921. Rachael Bekhor by a deed of that date declared that her share of the cost of the building had been provided by Mr. Benjamin and that that share was conveyed to her in trust by Mr. Benjamin and that she undertook to convey the said property, or any part of it, to such person or persons as Mr. Benjamin might direct and that Mr. Benjamin was then the owner of the one third share originally belonging to Rachael Bekhor. We are told that this property is let out as offices. In 1920, E. V. Sassoon, Rachael Bekhor, and A. J. Raymond executed a power of attorney which recited as follows: "Whereas we jointly or severally are now seized or possessed or may hereafter

become seised or possessed of lands, messuages and tenements at Calcutta and whereas we are desirous of appointing some fit and proper person to transact, conduct and manage on our behalf our affairs in relation thereto and have for such purpose selected Benjamin Nissim Elias of Calcutta, now know ye that we the said Ellice Victor Sassoon, Rachael Nissim Bekhor and Abraham Jacob Raymond jointly and severally do and each and every of us doth by these presents make, constitute and appoint the said Benjamin Nissim Elias our true and lawful attorney for us and in our name or for and in the name of any of us—

1. To conduct and manage all and singular our affairs in relation to lands, messuages and tenements of which we are or any of us is now jointly or severally seized or possessed or of which we or any of us may hereafter be jointly or severally seized or possessed at Calcutta."

2. For the purpose aforesaid to demand, recover and take possession of all and singular the lands, messuages, tenements now belonging or which may hereafter belong to us or any of us absolutely or by way of legal or equitable mortgage or in which we have or any of us has a beneficial interest either along or jointly with others and to view the state thereof and to give proper notices and directions for repairing the same and to oversee, let, sublet and manage the same.

3. To pay or allow all taxes, rates, charges, expenses and outgoing due and payable or to become due and payable for or on account of the said lands and immovable properties.

4. To contract with any person for leasing all or any of our immovable properties and any such person to let into possession thereof and to set fines for new leases and to accept surrender of leases and for that purpose for us and in our name and for and in the name of any of us to make, seal, deliver and execute any lease or grant or other lawful deed and instrument whatsoever which shall be necessary or proper in that behalf and also in our name or in the name of any of us to sign and give lawful notice to quit to any tenant of the said premises.

5. For us and in our name and for our benefit or for and in the name of and for the benefit of any of us to enter into, sign, execute, seal and deliver such agreement or agreements with any firm or individual as may be necessary for the sale, exchange or letting on lease of any of our immovable properties and also to sign, execute, seal and deliver all conveyances, deeds, supplicates receipts and other documents required to be signed or executed and to carry such agreement or agreements into effect and to appear before such Collector, Special Collector and other authorities and to give all such consents and do all such acts in the premises as to the Attorney may appear to be necessary or desirable.

6. For us and in our name or for and in the name of any of us to ask, receive and recover from all receivers, tenants and all other

occupiers whatsoever of any of our lands, houses, hereditaments and other immoveable properties all rents, arrears of rent, services, issues, profits, emoluments and sums of money now due, owing and payable or at any time hereafter to become due, owing and payable in respect of same premises in any manner whatsoever and also on nonpayment of or of any part thereof to enter and distrain and the distress and distresses therefound to retain and keep or to sell and dispose of according to law.

7. For us and in our name or for and in the name of any of us to sell all or any part of our lands, hereditaments, houses and other immoveable properties and to give receipts for all or any part of the purchase or other consideration money.

Then follow other provisions : " 9. For us and in our name and for and in the name of any of us to appear before any Registrar or Joint Registrar or Sub-Registrar of Assurances or other the proper officer or officers appointed under any Act for the time being in force for the registration of deeds, assurances, contracts or other instruments and there and then or at any time thereafter to present for registration and register or cause to be registered this Power of Attorney and any deed or document executed hereunder and answer such enquiries, make such acknowledgments and sign such papers and documents as may be necessary and also to do and execute such further acts and things as may be deemed expedient for registering or otherwise giving validity according to law to any deed or deeds or instrument or instruments which may be necessary for effectuating any act empowered by these presents".

On the 14th January, 1924, Mr. B. S. Benjamin executed a similar power of attorney appointing Mr. B.N. Elias, his attorney in Calcutta. The property, we are told, has been managed by Mr. Elias from the date of his appointment down to the present time, in accordance with those powers of attorney. Previous to the year 1933-34, the Income Tax Officer had not assessed the owners of this property as an " association of individuals." The question that we have to decide is whether the petitioners, Mr. Elias, Mr. Benjamin, Sir Victor Sasson (as he now is) and Mr. A. J. Raymond constitute an " association of individuals " within the meaning of Section 3 of the Income Tax Act. Section 3 reads as follows: " Where any Act of the Indian Legislature enacts that income tax shall be charged for any year at any rate or rates applicable to the total income of any assessee, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act, in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals ".

Previous to the year 1924, the words of the section in question were "individual, company, firm and Hindu undivided family". By the Indian Income Tax Amendment Act of 1924 (Act XI of

1924) the words "individual, Hindu undivided family, company, firm, and other association of individuals" were substituted for the former words. Those words "association of individuals" have to be construed in their plain, ordinary meaning. There is no difficulty about the word "individuals". "Associate" means, according to the Oxford Dictionary, "to join in common purpose, or to join in an action". Did these individuals join in a common purpose, or common action, thereby becoming an association of individuals? In my view, they did. In the first place, they joined together in the purchase of this property on the 9th January, 1920. In the second place, they have remained joint as owners of this property from the date of the purchase down to the present time. Thirdly, they have joined together, as the powers of attorney show, for the purpose of holding this property and of using it for the purpose of earning income to the best advantage of them all. Under these circumstances, it seems to me that looking at the position and construing the words of the Act in their ordinary common meaning, the four persons named are an "association of individuals". In arriving at that conclusion, I am fortified by the words of LORD JUSTICE COTTON in the case of *Smith* v. *Anderson* (15 Ch. 247, at page 282). There the learned LORD JUSTICE is discussing the meaning of the word "association" as used in Section 4 of the Companies Act of 1862. The word occurs along with the words "company or partnership". COTTON, L.J., says at page 282: "I do not think it very material to consider how far the word "association" differs from company or partnership, but I think we may say that if "association" is intended to denote something different from a company or partnership, it must be judged by its two companions between which it stands, and it must denote something where the associates are in the nature of partners. It seems to me (not that I think it material) that it might have been intended to hit the case which we have frequently seen, of a number of persons or a number of firms joining themselves together for the purpose of carrying on a particular adventure in order to make gain by it". Then he goes on to describe instances of that.

In my view these persons have joined themselves together and remained joined together for the purpose of buying, holding, and using that property "Norton Buildings" in order to make gain by it. In so doing they have become and were, at the time of this assessment an "association of individuals" within the meaning of Section 3 of the Indian Income Tax Act.

Three specific questions were put before this Court for answer in the statement of case by the Commissioner of Income Tax. They are as follows:—

(1) Whether in view of the circumstances of this case the petitioners constituted an association of individuals within the meaning of Section 3 of the Indian Income Tax Act?

In my view the answer to that question must be "Yes".

(2) Assuming that they constituted such an association of individuals whether in the circumstances of this case the said association can be said to be the owner of the property within the meaning of Section 9 of the Income Tax Act?

It was admitted by Mr. Banerji for the assessee that he could not contend to the contrary. The answer to question 2, in my opinion, must be "Yes".

(3) If such an association of individuals cannot be treated as owners of the property, whether the said association can be assessed under Section 12 of the Income Tax Act in respect of the income derived from the property in question?

In my view, having regard to the answers that I consider should be given to questions 1 and 2, question 3 does not fall to be answered. The Commissioner of Income Tax will get the costs of this hearing 7 gold mohurs; for the Vakil and the two Advocates' costs will be such fees as have already been paid to them.

COSTELLO, J.—The question which the assessee originally desired to have put before this Court was formulated by the assessee as follows " whether in view of the circumstances of the case the petitioners were legally treated as an "association of individuals" and whether the joint assessment on therein has been rightly made". The Commissioner of Income Tax, Bengal, thought fit, as he said, to dissect the issue and he formulated the three questions which have been referred to by my Lord the Chief Justice; but actually having regard to the way in which this case has been argued by Mr. S. N. Banerji on behalf of the assessee all that we are required to do is to answer a question which can be stated in the terms originally put forward by the assessee. Put quite shortly the question is whether the combination composed of Mr. B. N. Elias, Mr. B. S. Benjamin, Sir Victor Sasson and Mr. A. J. Raymond can properly be described for the purpose of assessment of income-tax as an "association of individuals" within the meaning either of Section 3 of the Income Tax Act, 1922, or of Section 55 of that Act. In point of fact one gathers that the assessee is rather more concerned about Section 55 than Section 3 because the former section is that dealing with super tax.

In my opinion it is of considerable importance to observe the conjunction and sequence of the descriptive words in both these sections. As my Lord has already pointed out, these sections were amended by the Act of 1924. By Section 3 of that Act and by Section 7 of that Act the words as they originally stood in Section 3 and in Section 55 were transposed and the expression "association of individuals" was interpolated into the sections. It is of considerable significance, in my opinion, for our present purpose that as Section 55 now stands the expression "other association of individuals" immediately follows the expression "unregistered firm" the whole sentence being "There shall be charged levied

and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, unregistered firm or other association of individuals not being a registered firm an additional duty of income tax in this Act referred to as super tax." Mr. Banerji was at very great pains to demonstrate to us that the combination of individuals with which we are concerned could not properly be described as partnership and he emphasised the fact that they were co owners of the property which is known as the "Norton Building". I have no doubt whatever that Mr. Banerji was perfectly justified and correct in inviting us to take the view that this was not a partnership but it seems to me bearing in mind the juxtaposition which I have mentioned, that although these four persons did not constitute a body which was the same as partnership it was in many respects similar to a partnership and was approximate to a partnership and it may well be that the intention of the legislature was to hit combinations of individuals who were engaged together in some joint enterprise but did not in law constitute partnerships within the definition of partnership either as originally given in the Contract Act or as now given in Section 4 of the Partnership Act.

Mr. Banerji invited us to take upon ourselves the difficult but not indeed impossible task of laying down a general definition of the expression "association of individuals". In my opinion that is not desirable from any point of view whatever. Each case must be decided upon its own peculiar facts and circumstances. When we find, as we do find in this case, that there is a combination of persons formed for the promotion of a joint enterprise banded together if I may so put it, co-adventurers to use an archaic expression then I think no difficulty whatever arises in the way of saying that in this particular case these four persons did constitute an "association of individuals" within the meaning of both Section 3 and Section 55 of the Indian Income Tax Act, 1922.

I therefore entirely agree with what has fallen from my Lord the Chief Justice and I am of opinion that the first question propounded by the Commissioner of Income Tax, Bengal, should be answered in the affirmative. As has been pointed out by my Lord the other two questions scarcely need any answer from us because they have not been seriously discussed by Mr. Banerji. It really follows from the answer which we have given to the first question that the answer to the second question will also be in the affirmative and the third question does not arise for decision."

Reference answered accordingly.

[IN THE CALCUTTA HIGH COURT.]

In the matter of KESHARDEO CHAMRIA

Sir Harold Derbyshire, C. J., and Costello, J.

July 10, 1935.

BEST JUDGMENT ASSESSMENT—APPEAL FROM ORDER REFUSING TO CANCEL ASSESSMENT—WHETHER RAISES QUESTIONS OF LAW—COMPETENCY OF REFERENCE—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 23 (4), 27, 66 (2) AND (3).

The only questions that can be raised in an appeal against an order under Section 27 and in the case of an assessment under Section 23 (4) of the Indian Income Tax Act are (1) whether the assessee was prevented by sufficient cause from making the return required by Section 22; or (2) whether he received a notice issued under Section 22 (4) or Section 23 (2); or (3) whether he had a reasonable opportunity to comply with the terms of the notices, or (4) whether he was prevented by sufficient cause from complying with the terms of the notices. All these are questions of fact and therefore there can be no reference under Section 66 (2) or (3) of the Income Tax Act from an order under Section 23 (4) or an appellate order under Section 27.

PER COSTELLO, J.—"*The assessee might be able to ask the Commissioner of Income Tax to state a case if he was in a position to say that there were* not any *material on which the Income Tax Officer could base his finding, or as it is usually put in analogous circumstances that there was* no *evidence on which the Income Tax Officer could find as he, in fact, did find. That is putting the matter at the very highest, but even that is not the correct position*".

Cases referred to :—

ABDUL BARI CHOUDHURY *v.* COMMISSIONER OF INCOME TAX, BURMA [1931] (I. L. R. 9 Ran. 281; A. I. R. 1931 Ran. 191; 133 I. C. 81; 5 I. T. C. 352).

JOT RAM SHER SINGH *v.* COMMISSIONER OF INCOME TAX, U.P. [1934] (I. L. R. 56 All. 933; 2. I. T. R. 129) *followed.*

Civil Reference No. 5 of 1935.

Case stated by the Commissioner of Income Tax, Bengal, under Section 66 (2) of the Indian Income Tax Act (XI of 1922).

Mr. Sen, for the assessee.

Dr. Radha Binode Pal, for the Commissioner.

STATEMENT OF CASE.

" At the request of the assessee named above, the question of law formulated in paragraph 8 of this Statement of Case is submitted to their Lordships the Judges of the Calcutta High Court for favour of their decision.

2. Two cases proceeded against this assessee simultaneously—one in respect of the assessment for the year 1932-33 under Section 23 of the Act and the other in respect of the assessment for 1931-32 under that section read with Section 34 of the Act and in both cases notices were issued and orders passed on the same date and there is one common order sheet. The assessee has filed an application for reference under Section 66 (2) of the Act in respect of both assessments, but as the facts and circumstances are identical, I propose to state a case only in respect of the assessment for the year 1932-33 and to decide the question at issue in the other assessment in accordance with their Lordships' decision.

3. On 30th August, 1932, the Income Tax Officer issued a notice under Section 22 (2) calling for a return of income by 18th October, 1932 and on the latter date the assessee filed a petition which I quote *in extenso* below :—

"To the Income Tax Officer, Howrah, case No. 255. The humble petition of Kesardeo Chamria most respectfully showeth :—1. That your petitioner is unable to-day to take necessry steps in the matter on account of ill-health. 2. That your petitioner was away on a change which did not improve his health and wherefrom he, therefore came back very recently and is now on the eve of his departure for a change in Bangalore. In the circumstances aforesaid, your petitioner prays that your Honour may be graciously pleased to grant him two months' time at least to enable him to do the needful for which act of grace your petitioner shall remain ever grateful to you. And your petitioner as in duty bound shall ever pray. The 18th October, 1932. Kesardeo Chamria, by H. Mitra."

And on that date the Income Tax Officer passed an order to the effect that the return should be filed by 30th October, 1932. The next order is dated 8th November, 1932 and refers to a petition of the same date which I also quote *in extenso* below :—

"To the Income Tax Officer, Howrah, case No. 255 of 1931-32. The humble petition of Kesardeo Chamria most respectfully sheweth :—1. That your petitioner is unable to do anything in the matter until the Official Receiver, High Court, Calcutta, and Raj Ramprotap Chamria Bahadur arrive here, both of whom are far away from the town on a change during the Pujah holidays. 2. That both of them are expected here within 10 days and on their return your petitioner will be able to do the needful in this matter. 3. That the Estate of your petitioner is the subject-matter of suits now pending in the Honourable High Court in the original side which your petitioner has brought as plaintiff on attaining majority. In the circumstances aforesaid your petitioner prays for at least two weeks' time to do the needful in the matter for which act of grace your petitioner will remain ever grateful to

you. And your petitioner as in duty bound shall ever pray. Dated, the 8th November, 1932, Kesardeo Chamria, by H. Mitra."

In that order the assessee was directed to prove his assertion by documents on 23rd November 1932 and on that date a third petition was filed which is also quoted *in extenso* below:—

"To The Income Tax Officer, Howrah. Dated 23—11—1932. The petition of Kesardeo Chamria. Re:—Return in the name of Messrs. Amlokchand Kesardeo, Sheweth:—1. That Babu Amlokchand is the petitioner's deceased father and the petitioner now represents the family. 2. That the petitioner has no independent source of income of his own but he is a co-sharer with other members of the firm of Messrs. Hardutrai Chamria and Company. 3. That the partnership and the connected joint estate are now in suits and the petitioner has not yet been allotted his share. 4. The petitioner therefore prays that his personal assessment be deferred till after the disposal of the pending suits. 5. That your petitioner will file copies for which he may be allowed further time. And your petitioner as in duty bound shall ever pray. Kesardeo Chamria, by H. Mitra, Pleader."

Whereupon the Income Tax Officer passed an order to the effect that he could not wait indefinitely and called for the accounts of 1931-32 under Section 22 (4) of the Act fixing 21st December, 1932 for production. The accounts called for were municipal bills of house property, counterfoils of rent receipts, deeds, lease papers and bank pass book. On the 21st December, 1932, that is, the date fixed the assessee filed a fourth petition which I also reproduce below.—

"To the Income Tax Officer, Howrah:

Dated 21st December 1932—The petition of Kesardeo Chamria of Cullen Place, Howrah. File No. 255. Re:—Notices under Section 22 (4), dated 24th November, 1932 in the name of Messrs. Amlokchand Kesardeo for 1930-31 and 1931-32, Sheweth:—1. That on receiving notices under Section 22 (2) the petitioner protested against the firm name and brought to your Honour's notice the fact of your petitioner's affairs. The petitioner again protests against the notices as addressed above. 2. That in compliance with your Honour's notices under Section 22 (4) the petitioner enters appearance and submits that the documents of properties required to be produced are obtainable from Rai Bahadur Seth Ramprotap Chamria and from the Receiver appointed by the Hon'ble High Court who is still in office. The petitioner therefore prays that his assessment file may be struck off in the circumstances. And your petitioner as in duty bound shall ever pray. Kesardeo Chamria, By H. Sarkar, Pleader."

The Income Tax Officer thereupon directed compliance with a notice under Section 22 (4) by 12th January, 1933, and on that date the assessee with another pleader appeared and produced only one bank pass book running from 15th January, 1929 to 31st November,

1932 but no other accounts. On the same date still another petition was filed, a copy of which I reproduce below :—

"To the Income-tax Officer, Howrah dated 12th January, 1933. The petition of Keshardeo Chamria of Cullen Place, Howrah. Re-assessment proceedings for 1931-32 and 1932-33 Sheweth :—1. That the petitioner herewith produced copies of the Court records in evidence of the fact that the partnership business of Messrs. Hardutari Chamria & Co. is in the hands of the Official Receiver appointed by the Calcutta High Court. The partnership is separately taxed in Calcutta though the petitioner is not aware of his share of income and profits thereof. 2. That by an order of the High Court dated 2nd April, 1931 in suit No. 183 of 1929 some of the properties in suit mentioned in Schedule thereof were transferred from the Official Receiver appointed in the said suit by order dated 28th July, 1930 to the joint management of the petitioner and Rai Bahadur Ramprotap Chamria and papers in respect of those properties are in joint custody of the petitioner and the said Rai Bahadur Ramprotap Chamria and return of income as well as evidences of those properties can only be submitted in such joint capacity inasmuch as by virtue of disagreement between the parties concerned, the petitioner moved the High Court before the last Puja vacation for reappointment of the Official Receiver for those properties and that matter is pending decision. 3. The petitioner herewith applies for a notice under Section 37 in the joint names of the petitioner and the said Rai Bahadur Ramprotap Chamria for production of papers called for by notice under Section 22 (4) and prays that such notice may be issued to enable the petitioner to comply. And your petitioner as in duty bonud shall ever pray. Keshardeo Chamria by H. Sarkar, Pleader,"

In this petition the assessee alleged that the papers relevant to the property the income of which was to be taxed were, by order of the High Court, in joint custody of the petitioner and Rai Bahadur Ramprotap Chamria, that the property in question was in their joint management, that the parties were in disagreement and requested that a summons under Section 37 of the Act should be issued in the joint names of the two persons referred to for the production of the accounts called for under Section 22 (4). The Income-tax Officer declined to issue such a summons and on 15th February, 1933 made an assessment under Section 23 (4) on a total income of Rs. 45,600 made up as follows :—

		Rs.
Income from property	...	43,200
Income from business	...	2,400

The assessee's application under Section 27 subsequently filed by him failed, as also his appeal against the refusal to reopen the assessment and ultimately the assessee filed an application

before me under Section 66 (2) of the Act in which certain questions of law were formulated and which I set out as Appendix A to this statement of case.

4. Litigation has been going on for a number of years between the assessee on the one hand and his uncle Rai Bahadur Ramprotap Chamria, on the other, regarding the partition of certain joint family property and litigation has at the same time been going on regarding the dissolution of a firm styled Hardutrai Chamria in both of which the assessee has or claims to have an interest. We are here concerned, however, only with the joint family property matter, as no income arising or held to arise to the assessee in respect of the firm has been taxed in this case.

5. In the suit No. 183 of 1929, *Keshardeo Chamria* v. *Rai Bahadur Ramprotap Chamria* their Lordships of the High Court passed an order on 28th July, 1930, directing that the Official Receiver should take over the moveable properties and the rents, issues and profits of the immovable properties belonging to the parties to this suit with power to collect outstanding debts and claims, with authority to grant leases and to file suits and it was further ordered that after taking possession of the said properties he should collect current rents and that he should be at liberty to divide the income of the said property coming into his hands less all outgoings, into two equal parts, and pay one equal part or share to each of the parties to the suit. A copy of that order is appended and marked B.

6. By a subsequent order in the same suit dated 2nd April, 1931, a copy of which is appended and marked *C* it was directed that the previous order dated 28th July, 1930 should be modified in this manner that in respect of certain properties set out below, the Official Receiver should not take possession and should be discharged from acting as receiver in respect thereof.

(The learned Commissioner enumerated the properties and continued):

and it was further ordered that the parties to the suit should jointly be given liberty to realise the rents of the above properties on joint receipts only and to make the necessary expenses thereout and to file rent suits, etc. The documents or titles were directed to be kept in the joint custody of the two parties to the suit and both were given liberty to invest the money which will go into their hands therefrom or to divide the same equally, while liberty was at the same time given to either party to apply for an order for re-appointment of the Official Receiver. It is understood that the Official Receiver has again been placed in charge of these properties with effect from August 1933, but no proof of this has been put on record by the assessee. It is in respect of the assessee's share of the income from these properties that assessments have been made on the assessee under the head 'property'.

6. (a) Under the circumstances stated above assessment was made under Section 23 (4) and the assessee's subsequent application under Section 27 was rejected, the Income-tax Officer not being satisfied that the assessee was prevented by sufficient cause from complying with the terms of the notice and on appeal against this order of refusal to make a fresh assessment, the Assistant Commissioner also found against the assessee and dismissed the appeal. The assessee then applied under Section 66 (2) requiring me to refer to the High Court certain questions of law. Under this section he can require me to refer only questions of law and only such questions of law as can be said to arise out of the appellate order. When an assessment is made under Section 23 (4), the assessee is to proceed under Section 27 for getting cancellation of the said assessment and for this purpose he must satisfy the Income-tax Officer that there was sufficient cause justifying the default. In this particular case the assessee neither submitted the return required by Section 22 of the Act nor did he comply with the terms of the notice under Section 22 (4). It is not his case that he did not receive the notices. The Income-tax Officer considered that he had reasonable opportunity to comply with the terms of the notice and that there was no sufficient cause preventing him from complying with the notices or from making the return. He therefore rightly refused to reopen the assessment under Section 27. Against this order an appeal is given by Section 30 with this proviso that no appeal shall lie in respect of an assessment made under Section 23 (4) or under that section read with Section 27. The result is that only questions that can be raised in an appeal against an order under Section 27 and in case of assessment under Section 23 (4) are:—

(1) Whether the assessee was prevented by sufficient cause from making the return required by Section 22; or

(2) Whether he received a notice issued under Section 22 (4) or Section 23 (2); or

(3) Whether he had a reasonal opportunity to comply with the terms of the notices; or

(4) Whether he was prevented by sufficient cause from complying with the terms of the notices.

The second matter did not arise for consideration in this case and as to the other items, the Assistant Commissioner did examine the evidence on record and came to a conclusion adverse to the assessee.

Now the scope of an appeal in such a case being thus limited the only question of law that can arise out of such appellate order must relate to the above matters, but it seems fairly clear that all these are questions of facts. If any of the above facts be found in favour of the assessee, then Section 27 is imperative and the Income-tax

Officer is bound to cancel the assessment. If in any case even after finding any of the items in favour of the assessee the Income-tax Officer or the Assistant Commissioner did not cancel the assessment, there might be a question of law arising out of the order, *viz.*, whether or not under the circumstances they would be bound to cancel the assessment. The other possible questions of law that may arise would relate to the procedure followed in determining the above facts. In this particular case the assessee did complain of such procedural defects and in view of this allegation of defective procedure I caused enquiries to be made in exercise of my power under Section 33 and as a result came to the conclusion that there was no substance in the complaint. This being the position, I hold that no question of law can arise or does arise out of the appellate order in this case. In view however of a certain observation made by a learned Judge in a recent Rangoon case and in view of these observations alone I decided to refer the question formulated below.

7. The decision of the Rangoon High Court referred to above is that of a Full Bench of the said Court in *Abdul Bari Chowdhury's case* (I.L.R. 9 Rang. 281) and I quote below from the observations of DUNKLEY, J., in that case at page 360 :—

"It follows that a question arising from the actual assessment under Section 23 (4) cannot be brought before the High Court under the provisions of Section 66, sub-Section (2) or (3) under any circumstances. The only question in any way connected with such an assessment which would be raised before the High Court would be a question of law arising out of the Income-tax Officer's order under Section 27, refusing to cancel the assessment under Section 23 (4) and to make a fresh assessment. Under the provisions of Section 27, that order must be based on a finding that the assessee was not prevented by sufficient cause from making the return required by Section 22, or complying with the terms of the notices issued under Section 22 (4) or Section 23 (2), as the case may be, and the only question of law which could possibly arise out of such a finding is whether there were any materials on which the Income-tax Officer could base his finding."

This observation, it may be noticed, is of DUNKLEY, J., only. The learned Chief Justice, however, held otherwise and it seems in the opinion of the learned Chief Justice as also of the majority of Judges of the Full Bench such a question would only be a question of fact.

8. In the light, however, of the observations made by DUNKLEY, J., I formulate the following question and refer it for their Lordships' decision :

" Whether in the circumstances of this case there were any materials on which the Income-tax Officer could base his finding that the assessee was not prevented by sufficient cause from filing

the return called for under Section 22(2) or producing the accounts called for under Section 22 (4)" ?

In this connection it is necessary to look at the history of the assessment again. This proceeded from 18th October, 1932 to 15th February, 1933. The assessee's case now is that he could neither file a return nor produce the accounts called for, as he individually had no access to the accounts of this property in the joint management of himself and Rai Bahadur Ramprotap Chamria, that access of one of the parties was allowed only by permission of the other, that he and the Rai Bahadur were on inimical terms and that the Rai Bahadur refused him such access. In this connection it is significant that all that the assessee said in this petition dated 18th October, 1932, was that he could not file a return because of ill-health, that he had already been away from Calcutta for a change and was again on the eve of departure from Calcutta for a change of climate and that he accordingly asked for 2 months' time to file a return. Similarly, in his petition dated the 8th November, 1932 he asked for time on the ground that the Official Receiver and the Rai Bahadur were then out of Calcutta while he, at the same time, stated that on their return he would be able to do the needful in the matter and he accordingly asked for two weeks' time. Again, in his petition of 23rd November, 1932, while he claimed that he had no independent source of income but was a co-sharer with other members of the firm of Messrs. Hardutrai Chamria & Co., he merely prayed that his personal assessment be deferred till after disposal of the pending suit. Then in his petition dated 21st December, 1932 while he alleged that the documents of properties required to be produced are obtainable from the Rai Bahadur and from the Receiver, he asked not that any steps should be taken to call for these documents from the above persons but only that the assessment file should be struck off and it was only in his petition dated 12th January, 1933, that he came out with the story that the properties in question were in the joint management of the assessee and the Rai Bahadur, that the papers in respect of these properties were in their joint custody, that evidence could be submitted only by both jointly and accordingly asking for a notice under Section 37 of the Act in the joint names of both. The fact that this point was sought to be made at such a late date in the proceedings is significant.

9. In the application under Section 27 of the Act, the assessee did not ask that he should be allowed to adduce evidence in support of his contention that he was prevented by sufficient cause from filing a return under Section 22 (2) or producing accounts under Section 22 (4) but merely averred that the prayer for a notice under Section 37 of the Act was illegally refused. This refers back to his petition of 12th January, 1933 reproduced in paragraph 3 above in which he asked for a summons in the joint names of the assessee and Rai Bahadur Ram Protap Chamria for

the production of the papers called for from assessee under Section 22 (4). The Income Tax Officer at this stage summoned Prahlad Rai, the constituted Attorney of the Rai Bahadur, who on examination deposed that the accounts of this property were in charge of a gomastha Gobordhan Chowdhury and that gomastha must produce all accounts and documents if required to do so by either party to the suit. Apparently, no opportunity was given to the assessee to cross-examine that witness. This was an illegality on the part of the Income Tax Officer and the assessee could make a just grievance of this. I, therefore, took action under Section 33 and directed the Assistant Commissioner to hold an enquiry for the purpose of determining what the exact position was and for coming to a decision on the question whether or not the assessee was in a position to file a return and produce accounts to examine in the presence of the assessee, the Rai Bahadur, his constituted Attorney Prahlad Roy and the gomastha and to allow the assessee to cross-examine them. I also asked him to call for the accounts in question and examine them with a view to determining whether there was any evidence to show that the assessee had access to them or that part of the receipts from this property were being distributed periodically to the assessee. Those enquiries have accordingly been made and as a result of the same I find it impossible to give any relief in this case, and I find that between May 1931 and October 1933 the assessee on various dates drew in all the sum of Rs. 83,559 from the joint account, this being the account of the rents realised from the property in question, the other party to the suit having drawn the same sum. The constituted Attorney of the Rai Bahadur, Prahlad Roy, and Gobordhan Chowdhury were duly examined and cross-examined at considerable length. Prahlad Roy stated there what he said before the Income Tax Officer at the Section 27 stage, that the gomastha must produce all papers and accounts in Court or elsewhere if required to do so either by the Rai Bahadur or by the assessee. He also said that he himself produced these papers and accounts before the Income Tax Officer in connection with the assessment of the Rai Bahadur and this is corroborated by the record of that assessment. This assessment was made in March 1933 and he alleges that before producing them he did not take the permission of the assessee. He went on to say that the books and papers were not in the joint custody of the parties to the suit, but of a joint gomastha with whom the key was kept and that any party who required them instructed the gomastha and the latter produced the papers. As against this, the gomastha when examined alleged that he never carried out the orders of either party on his own account in respect of the joint estate, but that on one occasion, the Rai Bahadur had access to the joint accounts, apparently for the purpose of his income tax return but that this was with the permission of the other party to the suit, that is, the assessee. If this is correct I am asked to believe that though the parties to this suit were on inimical terms for sometime before and though the assessee

could not get access to these accounts between November 1932 and February 1933 for his income-tax assessment purposes he nevertheless allowed the other party access to the accounts in March 1933 for the same purpose. I cannot believe this. The assessee is no weakling and his whole history shows that he is prepared to fight for his rights or assumed rights. Again, in answer to the question "If either of the joint managers requested you to see the accounts, were they allowed to do so?" the answer given was " No such occasion arose". If this is correct, it follows that the assessee made no effort whatever to get access to the accounts for the purpose of filing his income-tax return and producing them before the Income Tax Officer. It is true that later on in the course of his examination this witness said that the assessee at the time of his income-tax case wanted to see the accounts and that he (the witness) did not allow him to see the accounts alone that then he went to the Rai Bahadur to get his consent to the assessee's seeing the accounts and that the Rai Bahadur refused to give it. The evidence of this witness is in my view, contradictory and I refuse to believe that the assessee would allow the Rai Bahadur access to the accounts in March 1933 if the Rai Bahadur had refused him access to the same accounts a month or two before. I should perhaps place on record that this witness is now the servant of the assessee exclusively and this perhaps explains the unsatisfactory nature of his evidence. Great stress has been laid by the assessee on the expression used in a letter No. DK 1488, dated 15th February, 1934, from Messrs. Khaitan & Co., Solicitors to the Rai Bahadur addressed to Messrs. G. C. Chunder & Co., Solicitors to the assessee. In that letter Messrs. Khaitan & Co., wrote. "It was the duty of your client to authorise the Cashier Babu Kehm Chand Seraogea to act upon the request of our client alone. A joint gomashtha cannot do anything without the communication of the desire of both parties." I attach little weight to this piece of evidence. In the first place, the meaning is by no means clear and in the second place on what is *prima facie* the correct construction of the two sentences quoted, they are self contradictory.

10. In my respectful opinion, therefore the assessee was not prevented by sufficient cause from filing the return called for under Section 22 (2) or producing the accounts called for under Section 22 (4) and that there were materials on which the Income Tax Officer could base his finding to this effect. In my view, therefore, the question formulated should be answered in the affirmative".

The case was heard on the July 9, and the following judgment was delivered on July 10, 1935.

COSTELLO, J. :—This matter comes before us on a reference by the Commissioner of Income Tax under Section 66 (2) of the Indian Income Tax Act, 1922. The Commissioner says in the opening paragraph of the case which has been put before us that

"At the request of the Assessee named above" (that is to say Kesardeo Chamria) "the question of law formulated in paragraph 8 of the statement of case is submitted to their Lordships the Judges of the Calcutta High Court for favour of their decision". The question therefore, upon which our opinion is sought is this:— "Whether in the circumstances of this case there were any materials on which the Income Tax Officer could base his finding that the assessee was not prevented by sufficient cause from filing the return called for under Section 22 (2) or producing the amount called for under Section 22 (4)?"

In order to make it clear how this matter arises it is necessary that I should recite one or two facts in the history of the case. There were two Income tax matters proceeding against this assessee simultaneously—one in respect of the assessment for the year 1932-33 under Section 23 of the Act and the other in respect of the assessment for 1931-32 under that section read with Section 34 of the Act and in both cases notices were issued and orders passed on the same dates and there is one common order sheet. The assessee has filed an application for reference under Section 66 (2) of the Act in respect of both assessments, but as the facts and circumstances are identical, the Commissioner of Income Tax has stated a case only in respect of the assessment for the year 1932-33 and he proposes to decide the question at issue in the other assessment in accordance with the decision which we shall give in this matter.

The chronology of the case is as follows:—On the 30th August, 1932 the Income Tax Officer issued a notice under Section 22 (2) calling for a return of Income by the 18th of October, 1932; but instead of making that return the assessee on the 18th of October, 1932, filed a petition in which he said that he had been away on a change which had not improved his health and therefore he proposed to go away on another change to Bangalore. Accordingly on the same day the 18th of October, 1932, the Income Tax Officer made an order to the effect that return should be filed on the 30th October, 1932. Apparently no attention was paid to that order, for the next thing which happened was that the assessee put in another petition dated the 8th of November, 1932, in which he said that he was unable to do anything in the matter until the Official Receiver, High Court, Calcutta, and Rai Ramprotap Chamria Bahadur arrived in Calcutta. He said that they were both away from the town on a change during the Pujah holidays. He also said that his estate was the subject matter of certain suits then pending in the High Court on its Original Side. He asked for two weeks' time in which to do what was necessary in the matter. As a result of the receipt of that petition the Income Tax Officer made an order directing the assessee to prove his assertion by documents which he was to produce on the 23rd of November. No attention was paid to that order, but on the 23rd of November a third petition was put in by the assessee in which he stated that he had no independent source of income of his own but he was a co-sharer

with other members of the firm of Messrs. Hardutrai Chamria and Company and the partnership and the connected joint estate were now being dealt with in suits. He, therefore, asked that his personal assessment might be deferred till after the disposal of the suits which were then pending. After receiving that petition the Income-tax Officer made an order to the effect that he could not wait indefinitely and he called for the accounts of 1931-32 under the provisions of Section 22 (4) of the Act and fixed the 21st December, 1932 for the production of those accounts. The accounts which he asked for were municipal bills of house property, counter-foils of rent receipts, deeds, lease paper and bank pass book. On the day when these accounts ought to have been produced, that is to say the 21st December, 1932 the assessee put in a fourth petition in which he said "the petitioner in compliance with notices under Section 22 (4) enters appearance and submits that the documents of properties required to be produced are obtainable from Rai Bahadur Seth Ramprotap Chamria and from the Receiver appointed by the Hon'ble High Court, who is still in office. The petitioner therefore prays that his assessment file may be struck off in the circumstances." So that once more the assessee made no serious attempt to comply with the requirements of the Income-tax Officer. Thereupon the Income-tax Officer directed compliance by means of a notice under Section 22 (4) and that the compliance was to take place on the 12th January, 1933. On that date the assessee at last made an appearance before the Income-tax Officer together with a pleader but instead of producing all the accounts required by the Income-tax Officer he merely produced one solitary bank pass book containing entries for the period from the 15th January, 1929 to the 21st November, 1932 and no other accounts whatever. On the same day he put in another petition in which he said this: "By an order of the High Court dated 2nd April, 1931 in suit No. 183 of 1929 some of the properties in suit mentioned in Schedule thereof were transferred from the Official Receiver appointed in the said suit by order dated 28th July 1930 to the joint management of the petitioner and Rai Bahadur Ramprotap Chamria and papers in respect of those properties are in joint custody of the petitioner and the said Rai Bahadur Ramprotap Chamria and return of income as well as evidences of those properties can only be submitted in such joint capacity inasmuch as by virtue of disagreement between the parties concerned, the petitioner moved the High Court before the last Puja vacation for reappointment of the Official Receiver for those properties and that matter is pending decision.' In passing we observe that in that statement there is an admission for some period at any rate the assessee had control over the documents to which I have just referred. In the concluding paragraph of that petition the assessee said: "The petioner herewith applies for " a notice under Section 37 in the joint name of the petitioner and the said Rai Bahadur Ramprotap Chamria for production of papers called for by notice under Section 22 (4) and prays that such notice may be issued to enable the petitioner to comply." The Income Tax Officer declined to issue

a notice or summons under Section 37 and on the 15th February, 1933 he made an assessment under the provisions of Section 23 (4) on the basis of a total income of Rs. 45,600 made up as follows: income from property Rs. 43,200; income from business Rs. 2,400.

Thereupon about a month later, that is to say, on the 6th March, 1933 the assessee made a petition under the provisions of Section 27 of the Indian Income Tax Act of 1922. That petition is set out at page 17 of the paper book and in paragraph 3 thereof the petitioner set forth a number of grounds upon which he relied for having the assessment made under Section 23 (4) set aside. It is to be observed that none of those grounds with the possible exception of that appearing under the letter (i) that is to say the last of the grounds set out in the petition are really grounds admissible for an application under Section 27. Section 27 provides as follows:—"Where an assessee or, in the case of a company, the principal officer thereof, within one month from the service of a notice of demand issued as hereinafter provided, satisfies the Income Tax Officer that he was prevented by sufficient cause from making the return required by Section 22, or that he did not receive the notice issued under sub-Section (4) of Section 22, or sub-Section (2) of Section 23, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying, with the terms of the last mentioned notices the Income Tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of Section 23." That section therefore provides in essence that the only ground on which an assessment under Section 23 (4) can be attacked is that the assessee for reasons outside his control was unable to comply with notices which are the preliminary stages and indeed the condition precedent to the making of an assessment under Section 23 (4). Now the ground set out in the petition of the 6th March, 1933 under the letter (i) reads as follows:—"The petitioner does not yet know the details of his total income nor has he in his exclusive possession the documents not produced under Section 22 (4)." He is there referring, of course, to the notices which had been served upon him under the provisions of that sub-section requiring him to produce the various accounts which I have enumerated and in fact he is saying once more that he was unable to produce the documents and the accounts called for because they were not under his own control but were under the joint control of himself and of Rai Ramprotap Chamria Bahadur. That petition was dealt with by the Income Tax Officer on the 10th of May, 1933 and the decision of the Income Tax Officer appears in the order sheet which is set out at pages 18 and 19 of the paper book and is in these terms:

"I consider the grounds above and those submitted in the petition under Section 27 as below:

(1) The deposition made under Section 37 will show that the assessee could easily have filed his return and produced his accounts, etc., had he had the intention of doing so.

(2) Notice under Section 34 after assessments under Section 23 is only legal.

(3) He may refer to the style offered by him as "banker" before the Hon'ble High Court.

(4) Any leaving out of income will be covered by Section 34 only.

(5) The assessee is a resident of Howrah. He was absent temporarily on account of a marriage ceremony authorising his pleader to act. He returned after a few days only.

(6) The assessee did not comply under Section 22 (2) at all and his compliance under Section 22 (4) was nominal only. He had sufficient opportunity to comply. No sufficient cause has been established by which he was prevented from compliance.

I am therefore not in a position to entertain the petition under Section 27. "The petition is therefore rejected." Then he added "the same reasons apply to petition under Section 27 regarding assessment under Sections 34 and 23 (4). The said petition is therefore rejected".

That decision, as I have stated, is dated the 10th May, 1933. About a month later—on the 8th of June, 1933—the assessee made an appeal against that decision and set out a very large number of grounds on which that appeal purported to be based. The grounds of appeal are to be found at pages 20 and 21 of the paper book. With regard to that appeal and the proceedings against which it was preferred the Commissioner of Income tax in the statement of case that he has sent to us says on page 6 this: "The Income Tax Officer considered that he (the assessee) had reasonable opportunity to comply "with the terms of the notice and that there was no sufficient cause preventing him from complying with the notices or from making the return. He therefore rightly refused to re-open the assessment under Section 27. Against this order an appeal is given by Section 30 with this proviso that no appeal shall lie in respect of an assessment made under Section 23 (4) or under that section read with Section 27. The result is that the only question that can be raised in an appeal against an order under Section 27 and in case of assessment under Section 23 (4) are:—

(1) Whether the assessee was prevented by sufficient cause from making the return required by Section 22, or

(2) whether he received a notice issued under Section 22 (4) or Section 23 (2), or

(3) whether he had a reasonable opportunity to comply with the terms of the notices; or

(4) whether he was prevented by sufficient cause from complying with the terms of the notices."

Then he says: "The second matter did not arise for consideration in this case and as to the other items, the Assistant Commissioner did examine the evidence on record and came to a conclusion adverse to the assessee.

Now the scope of an appeal in such a case being thus limited the only question of law that can arise out of such appellate order must relate to the above matters, but it seems fairly clear that all these are questions of facts". With that statement of the learned Commissioner of Income Tax I entirely agree. The relevant section to which the learned Commissioner there refers is Section 30, sub-Section (1) which provides "any assessee objecting to the amount or rate at which he is assessed under Section 23 or Section 27 or denying his liability to be assessed under this Act, or objecting to a refusal of an Income tax Officer to make a fresh assessment under Section 27, or to any order against him under sub-Section (2) of Section 25 or Section 25-A or Section 28, made by an Income Tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order." Then there is this important proviso "Provided that no appeal shall lie in respect of an assessment made under sub-Section (4) of Section 23, or under that sub-Section read with Section 27." Then sub-Section 2 is as follows:—"The appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating to the assessment or penalty objected to, or of the date of the refusal to make a fresh assessment under Section 27, as the case may be: but the Assistant Commissioner may admit an appeal after the expiration of the period, if he is satisfied that the appellant had sufficient cause for not presenting it within that period." In passing one may observe that the assessee delayed in making his appeal almost until it was barred by the limitation provided in that sub-section. Section 31 provides in sub-Section (3) that in disposing of an appeal the Assistant Commissioner may, in the case of an order of assessment:—

(*a*) confirm, reduce, enhance or annul the assessment, or

(*b*) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income Tax Officer thinks fit or the Assistant Commissioner may direct, and the Income Tax Officer shall thereupon proceed to make such fresh assessment;

or, in the case of an order refusing to make a fresh assessment under Section 27;

(*c*) confirm such order, or cancel it and direct the Income-tax Officer to make a fresh assessment,

"or, in the case of an order under sub-Section (2) of Section 25 or Section 28,

(*d*) confirm, cancel or vary such order".

For our present purpose the position therefore is that on the appearing of the appeal before him the Assistant Commissioner could have confirmed the order made by the Income Tax Officer, he could have cancelled it and directed the Income Tax Officer to make a fresh assessment or he might have varied the order. What he in fact did was to dismiss the appeal and confirm the order which the Income Tax Officer made.

The appeal was heard on the 1st February, 1934, and the order made thereon is dated the 23rd February, 1934, and is set out at pages 22 and 23 of the paper book. The Assistant Commissioner sets out the question that he had to determine in this form. "The question for determination in this appeal is whether the appellant was prevented by reasonable cause from filing a return of income". The judgment concludes in this way.

"Even if it is conceded that the appellant had no individual income—I do not, however, admit this—this fact must have been within his knowledge and he could have sent in a nil return—if he had been minded to do so. In my opinion, there was nothing to prevent him making such a return, and I therefore regard his default as deliberate and inexcusable. The orders passed by the Income Tax Officer on the application filed under Section 27 are hereby confirmed under Section 31 (3) (*c*)."

This is the sub-section which I have already read. The assessee once again instead of submitting to the assessment made upon him, moved the Commissioner of Income Tax to state a case to this Court, and what happened in that connection is thus described by the Commissioner himself in his statement of case at page 6. "If any of the above facts" (he is referring to the facts which I have already quoted from that page) "be found in favour of the assessee, then Section 27 is imperative and the Income Tax Officer is bound to cancel the assessment. If in any case even after finding any of the items in favour of the assessee the Income Tax Officer or the Assistant Commissioner did not cancel the assessment there might be a question of law arising out of the order, *viz.*, whether or not under the circumstances they would be bound to cancel the assessment. The other possible questions of law that may arise would relate to the procedure followed in determining the above facts. In this particular case the assessee did complain of such procedural defects and in view of this allegation of defective procedure

I caused enquiries to be made in exercise of my power under Section 33 and as a result came to the conclusion that there was no substance in the complaint."

The learned Commissioner was there referring to the fact that in asking that a case should be stated for the opinion of this Court, the assessee did complain that there was some irregularity of procedure in connection with the proceedings before the Income Tax Officer when the petition under Section 27 was being disposed of. The Commissioner of Income Tax has, in my opinion, throughout dealt with this matter in a most careful, conscientious, and extremely considerate manner towards the assessee and as soon as he found that there was some defect in the procedure adopted by the Income Tax Officer, he gave directions that further enquiries were to be made and, in fact, an enquiry was held and witnesses were properly examined and, after considering the result of that enquiry, the learned Commissioner came to the conclusion that there was no real substance in any of the complaints made by the assessee. Accordingly he held that there was no question of law which properly could be made the subject matter of a reference to this Court. The learned Commissioner puts the matter in these words "I hold that no question of law can arise or does arise out of the appellate order in this case." Then he says: "In view however of a certain observation made by a learned Judge in a recent Rangoon case and in view of these observations alone I decide to refer the question which I have already read and which appears in paragraph 8 of the statement of the case. The Commissioner of Income Tax amplifies the matter in paragraph 9 of the Statement of the Case and he there says "In the application under Section 27 of the Act, the assessee did not ask that he should be allowed to adduce evidence in support of his contention that he was prevented by sufficient cause from filing a return under Section 22 (2) or producing accounts under Section 22 (4) but merely averred that the prayer for a notice under Section 37 of the Act was illegally refused. This refers back to his petition of 12th January, 1933 reproduced in paragraph 3 above in which he asked for a summons in the joint name of the assessee and Rai Bahadur Ram Protap Chamria for the production of the papers called for from the assessee under Section 22 (4). The Income Tax Officer at this stage summoned Prahlad Rai, the constituted Attorney of the Rai Bahadur, who on examination, deposed that the accounts of this property were in charge of a gomastha Gobordhan Chowdhury and that gomastha must produce all accounts and documents if required to do so by either party to the suit. Apparently, no opportunity was given to the assessee to cross-examine that witness. This was an illegality on the part of the Income Tax Officer and the assessee could make a just grievance of this. I, therefore, took action under Section 33 and directed the Assistant Commissioner to hold an enquiry for the purpose of determining what the exact position was and for coming to a decision on the question whether or not

the assessee was in a position to file a return and produce accounts to examine in the presence of the assessee, the Rai Bahadur, his constituted Attorney Prahlad Roy and the gomastha and to allow the assessee to cross-examine them. I also asked him to call for the accounts in question and examine them with a view to determining whether there was any evidence to show that the assessee had access to them or that part of the receipts from this property were being distributed periodically to the assessee. Those enquiries have accordingly been made and as a result of the same I find it impossible to give any relief in this case, and I find that between May 1931 and October 1933, the assessee on various dates drew in all the sum of Rs. 83,559 from the joint account, this being the account of the rents realised from the property in question, the other party to the suit having drawn the same sum."

Then the Commissioner proceeds to deal with the evidence which was given at the enquiry held by the Assistant Commissioner. It appears, as the Commissioner says in the middle of page 9 of the paper book "If this is correct, it follows that the assessee made no effort whatever to get access to the accounts for the purpose of filing his income tax return and producing them before the Income Tax Officer. Then he says "The evidence of the witness" (the witness in question is the gomastha) is, in my view, contradictory and I refuse to believe that the assessee would allow the Rai Bahadur access to the accounts in March 1933 if the Rai Bahadur had refused him access to the same accounts a month or two before. I should perhaps place on record that this witness is now the servant of the assessee exclusively and this perhaps explains the unsatisfactory nature of his evidence."

The learned Commissioner closes his statement of the case by saying in paragraph 10 "In my respectful opinion, therefore, the assessee was not prevented by sufficient cause from filing the return called for under Section 22 (2) or producing the accounts called for under Section 22 (4) and that there were materials on which the Income Tax Officer could base his finding to this effect. In my view, therefore, the question formulated should be answered in the affirmative".

In my opinion, the view taken by the learned Commissioner of Income tax is entirely correct. It appears from the summary of the evidence appearing at page 9 of the paper book that there was ample material upon which both the Income Tax Officer and the Assistant Commissioner could come to the conclusion that the assessee was not prevented by sufficient cause from complying with the terms of the notice which had been served upon him. The learned Commissioner of Income Tax is, in my opinion also correct in taking the view that the question which the Income Tax Officer and the Assistant Commissioner had to decide were purely questions of fact and, as the Commissioner said, no question of law did or could arise out of the appellate order made by the Assistant Commissioner.

In referring this case for the opinion of this Court, the learned Commissioner has, obviously, gone out of his way to be generous and indulgent, and, indeed needlessly indulgent to the assessee. There was no need at all, in law, in my opinion for this Reference ever to have been made, especially having regard to the fact that it was made solely upon the basis of observations made by one of the learned Judges of the Rangoon High Court, which was contrary to the view expressed by four other learned judges of that Court, including the Chief Justice himself. The case referred to by the learned Commissioner, in which the observations of JUSTICE DUNKLEY appears is that of *Abdul Bari Chowdhury* v. *Commissioner of Income tax, Burma* (I. L. R. 9 Rangoon 281). The judgment of Mr. JUSTICE DUNKLEY appears at page 303. The learned judge begins his judgment by saying "I agree with my Lord, the Chief justice."

The passage to which the Commissioner of Income-tax refers appears at page 304, and is as follows: "It follows that a question arising from the actual assessment under Section 23 (4) cannot be brought before the High Court under the provisions of Section 66, sub-Section (2) or (3), under any circumstances. The only question in any way connected with such an assessment which could be raised before the High Court would be a question of law arising out of the Income-tax Officer's order under Section 27, refusing to cancel the assessment under Section 23 (4) and to make a fresh assessment. Under the provisions of Section 27 that order must be based on a finding that the assessee was not prevented by sufficient cause from making the return required by Section 22, or complying with the terms of the notices issued under Section 22 (4) or Section 23 (2) as the case may be, and the only question of law which could possibly arise out of such a finding is whether there were any materials on which the Income-tax Officer could base his finding."

Now, as I read that judgment, it seems to me that at the very utmost what Mr. JUSTICE DUNKLEY intended to say was that there might possibly be a question of law. In this respect the assessees might be able to ask the Commissioner of Income-tax to state a case, if he was in a position to say that there were *not any* material on which the Income-tax Officer could base his finding, or as it is usually put in analogous circumstances, that there was *no* evidence on which the Income-tax Officer could find as he, in fact did find. That is putting the matter at the very highest, but in view of the opinion expressed by SIR ARTHUR PAGE, the Chief Justice, and the other three Judges who agreed with him, but did not give separate judgment. I incline to the view that even that is not the correct position. Touching this particular point, SIR ARTHUR PAGE said at page 299 of the report: "Under Section 27 the issue is one essentially of fact, namely, whether the assessee 'was prevented by sufficient cause from making the return required by Section 22, or that he did not receive the notice issued under

sub-Section (4) of Section 22, or sub-Section (2) of Section 23 or, that he had not a reasonable opportunity to comply or was prevented by sufficient cause from complying with the terms of the last mentioned notices". That of course is a quotation from the Act itself. The learned Chief Justice proceeds as follows: If he satisfies the Income-tax Officer that he was not in default the Income-tax Officer "shall cancel the assessment". In an appeal under Section 30 (1) against the refusal of the Income-tax Officer to make a fresh assessment under Section 27 the only question that arises is the same question of fact as that which fell to be determined by the Income-tax Officer under Section 27, and in such an appeal it is immaterial whether the assessment made under Section 23 (4) was valid or not".

Lower down at page 300, the learned Chief Justice says this: "I wish to add that, of course, in a proceeding under Section 27 the onus lies upon the assessee, and if the assessee fails to produce any evidence in support of his application that the assessment made under Section 23 (4) should be cancelled, that in itself would provide material upon which the Income-tax Officer would be justified in basing a refusal to cancel the assessment that had been made under Section 23 (4). On the other hand, if the assessee adduced evidence in support of his application under Section 27 the weight to be attached to that evidence is a matter for the Income-tax Officer to determine". And again at page 301, SIR ARTHUR PAGE said "under Section 27, however, the Income-Tax Officer has to determine whether the assessee was prevented by sufficient cause from complying with the requirements of the law as set out in Section 27. That is essentially a question of fact and not of law. If the assessee satisfies the Income-tax Officer that in the circumstances of the case he was prevented by sufficient cause from complying with the requirements of the law prescribed under Section 27, it is provided that the Income tax Officer "shall" cancel the assessment."

The view taken by the majority is not the view of Judges of the Rangoon High Court only, for the case which I have just cited was followed by the Allahabad High Court in the case of *Jotram Sher Singh* v. *Commissioner of Income tax* (reported in I.L.R. 56 All. 933 at page 945). Mr. JUSTICE BENNET who was sitting with Mr. JUSTICE NAIMATULLAH said this: Now the first question which the assessee desires to be treated as a question of law is in regard to this finding of fact and is as follows. Whether in the absence of any evidence whatever to prove the possession of the four account books for the Sambat year 1986 by the petitioner, the Income-tax Officer was justified in law in holding that the petitioners had been guilty of non-production of the said books? The assumption underlying this question is that it was necessary for the finding that there should be some oral evidence to the effect that the books were still in the possession of the assessee. This is a very common delusion and is constantly brought forward

in argument. The theory is contrary to the provisions of Section 103 of the Indian Evidence Act, which is as follows: The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In the present case it was admitted that these books had existed and had been produced before the Income Tax Officer in the original assessment dated the 20th of May, 1930. The assessee desired the Court to believe that these books had been lost subsequently. The burden of proof of that fact lay on him. It was for the Income Tax Officer, and the Assistant Commissioner to decide whether he had discharged that burden or not. They considered that the evidence which he produced was not sufficient to prove his allegation. No question of law arises from their decision on this point."

It is, in my opinion, clear beyond all question both from the circumstances of the case and the authority of the two decisions to which I have referred that in the present instance there was no question of law which could be referred for the opinion of this Court under the provisions of Section 66 (2) of the Income Tax Act. Therefore, there was no obligation on the Commissioner of Income Tax to have formulated the question which he has submitted to this Court—no necessity whatever. But as that question is before this Court and as the matter has been fully argued by Mr. Sen on behalf of the assessee, we are in a position to say that the answer to the question must be in the affirmative.

As regards costs, the assessee must pay the costs of the other side, 7 gold mohurs for the Vakil and as regards the two Advocates, such fees as have been actually paid to them.

DERBYSHIRE, C.J.—I agree.

Reference answered accordingly.

[IN THE LAHORE HIGH COURT.]

[FULL BENCH.]

MADAN MOHAN LAL

v.

COMMISSIONER OF INCOME TAX, PUNJAB & N. W. F. P.

Sir James Addison, Acting C.J., Dalip Singh, J., and Din Mohammad, J.

July 11, 1935.

RE-ASSESSMENT—INCOME 'ESCAPING ASSESSMENT', MEANING OF—INCOME SHOWN IN RETURN—DELIBERATE OMISSION TO ASSESS—RE-ASSESSMENT, LEGALITY OF—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 34.

The assessee was the manager of a joint Hindu family. He had also some individual income. In his assessment as an individual for the year 1931-32 he made a return in which a sum of Rs. 79,543 was also included. In the meantime the Income tax Officer dealing with the assessment of the joint family held that this amount of Rs. 72,543 was the income of the family and not the private income of the manager. Upon this the Income-tax Officer making the individual assessment excluded this sum from the individual income of the assessee and assesssd him to income-tax only on the remaining portion of the income shown in his return. The joint family appealed to the Assistant Commissioner who held that this item of Rs. 79,543 was not the income of the family but the individual income of the assessee. Thereupon the Income-tax Officer making the individual assessment issued a notice under Section 34 of the Income-tax Act upon the assessee in his individual capacity and assessed him upon the income which had thus been excluded from the family assessment. The question being whether this income 'had escaped assessment' and the Income-tax Officer had power to make an assessment under Section 34:

Held, *by the Full Bench* (DALIP SINGH, J., *dissenting*): *That Section 34 of the Act is not confined to cases where income had not been returned at all; it applies also to cases where an item of income is included in the return made by the assessee but is left unassessed by the Income-tax Officer, or if assessed in the first instance the assessment is cancelled by any appellate or revisional authority; the income in question had escaped assessment within the meaning of Section 34 and the assessee was rightly assessed under Section 34 on this income.*

Per DALIP SINGH, J., (*contra*) :—*The word 'escaped' in Section 34 should not be read in the widest sense that that word is capable of bearing. It means 'eluded notice' in the course of assessment and does not mean 'had avoided being assessed' and the expression 'had escaped assessment' is not equivalent to 'has not been assessed.' In order to 'escape assessment' the income must avoid both calculation and charging and there is no distinction between mistakes of fact and mistakes of law on the part of the Income-tax Officer.*

KISHEN KISHORE *v.* COMMISSIONER OF INCOME TAX, PUNJAB (I.L.R.) 14 Lah. 255; 1933 I.T.R. 143) *overruled on this point.*

Cases referred to:

AMIR SINGH SHER SINGH *v.* COMMISSIONER OF INCOME TAX, PUNJAB [1935] (A.I.R. 1935 Lah. 361; 3 I.T.R. 171).

ANGLO-PERSIAN OIL CO., (INDIA) LTD. *In re* [1933] (A.I.R. 1933 Cal. 777; 149 I.C. 919; 60 Cal. 840).

BURN & CO., *In re* [1934] (2 I.T.R. 30; 38 C.W.N. 204; A.I.R. 1934 Cal. 515; 150 I.C. 404; 61 Cal. 132) (S.B.)

COMMISSIONER OF INCOME TAX, BURMA *v.* U LU NYO [1933] 1 I.T.R. 373; 146 I.C. 300; 12 Rang. 118).

COMMISSIONER ON INCOME TAX, BURMA *v.* N.N. BURJORJEE [1931] (131 I.C. 507; 9 Rang. 161).

COMMISSIONER OF INCOME TAX, MADRAS *v.* KRISHNA CHANDRA [1926] (91 I.C. 940; 49 Mad. 22).

GANESH DAS, *In re* [1927] (A.I.R. 1927 Lah. 248; 100 I.C. 675; 8 Lah. 354).

KISHEN KISHORE *v.* COMMISSIONER OF INCOME TAX [1933] (1 I.T.R. 143; A.I.R. 1933 Lah. 284; 141 I.C. 415; 14 Lah. 255).

LACHHIRAM BASANTLAL *In re* [1931] (A.I.R. 1931 Cal. 545; 133 I.C. 187; 58 Cal. 909) (S.B.).

RAJENDRA NATH *v.* COMMISSIONER OF INCOME TAX, BENGAL [1934] (2 I.T.R. 71; 147 I.C. 663; 61 I.A. 10; 61 Cal. 285).

Case stated by the Commissioner of Income Tax, Punjab and N. W. F. P. under Section 66 (1) and (2) of the Indian Income Tax Act (Ref. No. 40 of 1934).

The necessary facts are stated fully in the judgments of ADDISON, Ag. C.J., and DALIP SINGH, J. (See pp. 448 and 450 *infra.*)

M. C. Mahajan, for the assessee.

J. N. Aggarwal and *S. M. Sikri*, for the Commissioner.

DIN MOHAMMAD, J. :—The question referred by the Commissioner under Section 66 (2) is as follows:—

(1) Whether assessment was validly made under Section 34 of the Act upon the income, after the preceding events, namely:—

(i) The assessee included the said income in return under Section 22 (2).

(ii) The Income Tax Officer making assessment upon the Hindu undivided family, of which Lala Madan Mohan Lal is the *Karta* held the said income to be income of that family, had included it in assessment thereon.

(iii) The Income Tax Officer making assessment upon the present assessee thereupon did not include the said income in his assessment under Section 23 (3).

(iv) The Hindu undivided family succeeded in appeal against the inclusion of the said income in their assessment.

Under Section 66 (1) he has referred the following question :—

"If the answer to the first question be in the negative, will there be any limitation of time (other than general reasonableness)

upon an order to be duly made under Section 33 of the Act in review of the initial assessment under Section 23 (3) and adding the said income thereto."

The principal question with which we are really concerned is the one under Section 66 (2). The answer to this question depends on the interpretation that can be put on the words "escaped assessment as used in Section 34 of the Income Tax Act. Section 34 reads as follows :—

"If for any reason income, profits or gains chargeable to income tax has escaped assessment in any year or has been assessed at too low a rate, the Income Tax Officer may, at any time, within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains * * * a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22 and may proceed to assess or re-assess such income, profits or gains and the provisions of this Act shall so far as may be, apply accordingly as if the notice was a notice issued under that sub-section :

Provided that the tax shall be charged at the rate at which it would have been charged, had the income, profits or gains not escaped assessment or full assessment as the case may be."

The assessee contends that this section can be invoked only if income is omitted to be duly returned and not if income having been duly returned is left out either intentionally or unintentionally by the Income Tax Officer concerned. The Commissioner, on the other hand, maintains that the section is wide enough to cover every case of non-assessment.

On behalf of the appellant reliance is mainly placed on the following authorities :—*Kishen Kishore* v. *Commissioner of Income Tax, Punjab*; *Commissioner of Income Tax, Burma* v. *U Lu Nyo*; *Burn & Co., In re*; *Rajendra Nath* v. *Commissioner of Income Tax, Bengal*. In *Kishen Kishore* v. *Commissioner of Income Tax, Punjab*, the Income Tax Officer assessed *K* to income tax as the head of an undivided Hindu family, consisting of himself and his son, on the income of the family during the year previous to the tax year. On review, the Commissioner set aside the assessment and directed the Income Tax Officer to assess *K* as an individual; whereupon the Income Tax Officer served upon *K* a notice under Section 22 (2) read with Section 34 of the Income Tax Act, calling upon him to submit a declaration of his total income from all sources for the previous year for the purpose of re-assessing him for the tax year. It was contended on behalf of the assessee that as his income could not be said to have escaped assessment, Section 34 did not apply. JAILAL, J., who delivered the judgment, in which MONROE, J., concurred, remarked that it was clear from the facts of the case that when the assessment was originally made for the first time on the assessee as the head of the undivided Hindu family, no part of

the income was alleged to have been concealed by him and that the income which was sought to be assessed was, therefore, disclosed and was known to the income tax authorities. In these circumstances, it was held that the income could not be said to have escaped during the previous year, the expression escaped connoting failure by the taxing authority to tax the income owing to accidental or deliberate omission by the assessee to declare it or to some similar circumstance and not including cases where the income was known or disclosed to the income tax authority and had been the subject of assessment which had, however, been set aside later. No case law has, however, been discussed by the learned Judges in arriving at this conclusion.

In *Commissioner of Income Tax, Burma* v. *U Lu Nyo* the assessee was engaged in tobacco business during the accounting period and produced before the Income Tax Officer for the purpose of assessment certain accounts which were rejected. The Income Tax Officer assessed the income derived from the tobacco business under Section 23 (3). In the following year, another Income Tax Officer on going further into the matter was dissatisfied with the previous assessment and took action under Section 34 of the Income Tax Act, treating the income as having escaped assessment before. He found *inter alia* that his predecessor was wrong in thinking that the profit of the tobacco business was only Rs. 30 a maund and held that it should be calculated at Rs. 60 a maund. On these facts, the learned Judges of the Rangoon High Court held that the Income Tax Officer had no jurisdiction to revise the assessment for the previous year which was completed and had become final. It will be obvious that this authority is clearly distinguishable, as the facts before us are quite different. In that case no income had been found to have been either omitted from the original return or to have been deliberately exempted from assessment by the Income Tax Officer. What the Income Tax Officer did was to correct the estimate at which the profit had been previously assessed, and that was obviously unauthorised.

In *Burn & Co., In re* the learned Judges did not express any definite opinion on the point at issue and decided the case on a different point. The main question before them was whether a certain notice was within time or not, and as the earned Judges found that they could dispose of this question without definitely deciding as to when the income could be said to have escaped, they avoided a definite expression of opinion on that matter. This is clear from page 139 of the report. It may also be remarked that had the learned Judges been satisfied as to the meaning of the term " escaped " as contended by the assessee's counsel, it would not have been necessary to touch the other point at all.

The most important judgment to be considered in this connection, however, is *Rajendranath* v. *Commissioner of Income Tax, Bengal.* It is in a way connected with *Burn & Co., In re*, as the appeal

before their Lordships of the Privy Council had arisen from certain proceeding which had been referred to in that judgment. It was contended before their Lordships of the Privy Council that an assessment once begun, if not completed within the year, could not be made unless it was done under Section 34 of the Income Tax Act, as, in those circumstances, the income could be said to have escaped assessment. The main question, therefore, before their Lordships of the Privy Council, as remarked by LORD MACMILLAN at page 286 of the report was whether it was competent to make the assessment in question on the firm after the expiry, on the 31st March, 1928, of the year in respect of which the assessment was made. The position taken before their Lordships of the Privy Council was evidently untenable and their Lordships in this connection remarked as follows at pages 90-91 of the report :—

"The appellants, however, submit that this is a case of income escaping assessment, within the meaning of Section 34. Assessment they argued, is a definite act, indeed the most critical act in the process of taxation. If an assessment is not made on income within the tax year, then that income, they submit, has escaped assessment within that year, and can be subsequently assessed only under Section 34 with its time limitation. This involves reading the expression 'has escaped assessment' as equivalent to 'has not been assessed.' Their Lordships cannot assent to this reading. It gives too narrow a meaning to the word 'assessment' and too wide a meaning to the word 'escaped'. That the word 'assessment' is not confined in the statute to the definite act of making an order of assessment appears from Section 66 which refers to 'the course of any assessment., To say that the income of Burn and Company which in January 1928 was returned for assessment and which was accepted as correctly returned, though it was erroneously included in the assessment of Martin and Company, has 'escaped assessment' in 1927-28 seems to their Lordships an inadmissible reading. The fact that Section 34 requires a notice to be served calling for a return of income which has escaped assessment strongly suggests that income, which has already been duly returned for assessment, cannot be said to have 'escaped' assessment within the statutory meaning. Their Lordships find themselves in agreement with the view expressed in *In re Lachhiram Basantlal* by the learned Chief Justice RANKIN : "income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessee's income which have not yet terminated in a final assessment thereof."

I have given this passage *in extenso*, as in my view the decision of this case hinges on the construction which is to be placed on the view of their Lordships of the Privy Council as expressed above. If the passage means, as urged by the counsel for the assessee, that any income, which is once returned, cannot be said to have escaped, no matter what may have happened afterwards, the assessee must succeed. But if, on the other hand, the above passage

means something else, then he must fail, as there is ample authority against him from the various High Courts in India. As stated above, the question before their Lordships was whether a certain notice was within time and in order to find a complete answer to the question, it was necessary to interpret the word "escape". Their Lordships did it in particular reference to the question before themselves, and the key of the whole passage really lies in the quotation from Chief Justice RANKIN's judgment made by their Lordships of the Privy Council. The decision arrived at by their Lordships of the Privy Council is that if once the assessment proceedings have started, it will not matter if they do not terminate in the year in which they have been started and so long as these proceedings continue, it will not be possible to say that the income has escaped assessment. When their Lordships remarked that the expression "has escaped assessment" was not equivalent to "has not been assessed," they obviously meant to convey the sense that the charge had not been determined, or, in other words, the final order had not been passed. The contention of the assessee's counsel that while remarking that the phrase "escaped assessment" is not equivalent to "has not been assessed" their Lordships of the Privy Council intended to lay down that this meaning of 'has not been assessed' cannot be put upon the expression 'escaped assessment' under any circumstance, cannot be accepted. The element of non-assessment is present in every case, whether the assessment is not made on account of non-inclusion of the income by the assessee in his return or is not made even if the income is returned, on account of an erroneous judgment by the Income Tax Officer or on account of his oversight. Whether we place a restricted interpretation on the term "escaped" or give it a much wider signification, the element of non-assessment must be present. To my mind, this judgment does not lay down such a proposition as is contended for on behalf of the assessee.

In addition to the authorites cited above, counsel for the assessee has also relied on the scheme of the Act, and urged that the sequence of the sections by itself indicates that Section 34 was intended by the Legislature to apply to cases of non-inclusion only and not to cases of accidental or deliberate failure of the Income Tax Officer. He has urged that after the procedure for assessment has been provided for, the Legislature has enacted Section 30 and allowed an aggrieved assessee to appeal to the Assistant Commissioner against certain orders passed by the Income Tax Officer against him. Section 31 lays down the procedure for the hearing of appeals, Section 32 provides for appeals to the Commissioner against certain orders of Assistant Commissioners. Section 33 confers certain powers of revision or review on the Commissioner, Section 35 empowers the Commissioner or Assistant Commissioner or the Income Tax Officer to rectify certain mistakes. On this, counsel argues that as Section 34 has been inserted between Section 33 and Section 35, it is evident that it is not intended to

correct any mistakes of law which can be corrected under Section 33, or mistakes of fact which can be corrected under Section 35, and that it is merely intended to provide for those cases where there is no mistake apparent on the face of the record arising either in law or on facts. I do not however think that any argument can be developed on this score. Moreover, Section 33 empowers only the Commissioner and none else to revise or review the proceedings taken under this Act by any authority subordinate to him or by himself while exercising the power of an Assistant Commissioner. Section 35 is confined to such mistakes as are apparent from the record of appeal, revision or assessment as the case may be; and if we restrict the scope of Section 34 also in the manner suggested, then no provision in the Act will be left to meet cases like the present where an assessment is cancelled by an appellate or a revisional authority as being erroneous in law and the Income Tax Officer wishes to re-assess such income.

It is further urged that the Income Tax Act, being a fiscal enactment, should be construed strictly and in favour of the subject. Even if this were so, this will not help the appellant. In the first place, Section 34 is a mere machinery section and not a charging section and consequently this canon of the interpretation of statutes will not apply. Secondly, even a strict construction of this section will not justify the imposition of any restrictions on the interpretation of the word "escaped". As I understand the law a strict interpretation may prohibit the importation of any extraneous matter into any statutory enactment but will not justify the elimination or subtraction of any material ingredients from it. If a plain word carries a plain sense in the English language, however strict the law may interpret it, it will not ignore the ordinary meanings which it carries. Taking now the dictionary meaning of the term, I find that the word "escape" admits of more than one signification. In *Murray's Oxford Dictionary*, this word has been defined as follows :—"Free oneself from (a person's grasp or control) to get safely out of (painful or dangerous conditions); to avoid capture, punishment or any threatened evil; to elude (observation, search etc.); to elude notice (of a person); to get off safely when pursued or imperilled; to get clear away from (pursuit or a pursuer); to elude (a person's grasp); to succeed in avoiding (anything painful or unwelcome)". It is evident, therefore, that it connotes the idea of elusion as well as that of avoidance at the same time. For example, if an item of income is not charged because it is not included in the return, it would be proper to say that that income has escaped assessment. Equally proper the expression will appear to be even if the non-charge follows upon the refusal of the Income Tax Officer to charge it, whether that refusal is based on legal or on illegal grounds. Similarly, income will be said to have escaped assessment if it has not been charged on account of an oversight by the income-tax authorities; and so long as these interpretations of the word "escape" are permissible without any straining or stretching of the language, to my mind it will be a violence of all

canons of interpretation not to interpret it so. In other words, it would be wrong to place any restrictions on the generality of its meanings. As already remarked, the authorities which have attempted to restrict its meaning have not stated any reasons as to how they justified that course. "Elusion" by itself imports the idea of the existence of the thing eluded and as the meaning of the term "escape" covers the idea of elusion, it will not be a sound proposition of law to urge that in order to justify an application of this term, the thing should not have existed. It is all the more reasonable to interpret it in a wider sense, as in the section itself this expression is qualified by the words "for any reason".

I am fortified in my conclusion by the following authorities: *Commissioner of Income Tax, Madras* v. *Krishna Chandra*, *Anglo-Persian Oil Co.* v. *Commissioner of Income Tax, Bengal*, *Ganesh Das In re* and *Commissioner of Income Tax, Burma* v. *N.N. Burjorjee*. In *Commissioner of Income-tax, Madras* v. *Krishna Chandra*, it was held that under Section 34 of the Act a person was liable to be assessed to income-tax in a succeeding year for an income in respect of which he was exempted by the Income Tax Officer in the previous year not inadvertently but deliberately on a consideration by the officer of the question of the liability. Sir Murray Coutts Trotter, C. J., while delivering his judgment remarked as follows:—

"It is said that 'escaped assessment' must mean not that the question has been considered and decided in favour of the assessee, but that the Income Tax Officer has omitted to consider the question at all or was unaware of the existence of the property now sought to be taxed and, therefore, passed it over and that it does not apply to cases where the Income Tax Officer on consideration came to the conclusion, *ex hypothesi* an erroneous conclusion, that the property in question was not assessable. It seems to me that that construction is forbidden by the alternative case put in the section. That cannot be a matter of mere inadvertence, that must refer to a deliberate assessment made by the Income Tax Officer in the preceding year with knowledge of the facts and circumstances. It appears to me that a similar view must be taken of the previous words 'escaped assessment' and that it applies to cases where the Income Tax Officer has deliberately adopted an erroneous construction of the Act just as much as to a case where the officer has not considered the matter at all but simply omitted the assessable property from his view and from his assessment".

This authority was followed in *Anglo-Persian Oil Co., In re*. Sir George Rankin, C. J., observed as follows:—

"I see no way of holding that Section 34 is inapplicable to put right an assessment, by which a deduction has been improperly allowed. Such a case is, in my opinion, a case of income escaping assessment * * and there is nothing in Section 34 which limits it to cases of non-disclosure by the assessee or discovery of

new matter by the income tax authorities or inadvertence as distinguished from erroneous deliberations on the part of these authorities".

In *Ganesh Das, In re*, the Commissioner of Income Tax had urged that Section 34 could not be invoked in respect of income which had been assessed in the hands of an assessee to whom it was subsequently found not to belong. The learned Judges remarked that this argument did not appear to them to be sound, and added :—

"Whatever may be the reason for which the Income Tax Officer failed to assess the income within the period prescribed by law, he is not competent to assess it after the expiration of that period of limitation. The income escaped assessment so far as the person who received it was concerned".

It may be remarked that one of the judges responsible for the decision was the learned Judge who delivered judgment in *Kishen Kishore* v. *Commissioner of Income Tax, Punjab.*

In *Commissioner of Income Tax, Burma* v. *N. N. Burjorjee*, three Judges of the Rangoon High Court observed as follows :—

"We are of opinion that Section 34 is applicable to cases in which either no assessment at all has been made upon the person who received the income, profits or gains liable to assessment, or where an assessment has been made in the course of the year, but some portion of the income, profits or gains of such assessee for some reason or other has not been included in the order of assessment; such income is income which has 'escaped assessment' in the year, and falls within the ambit of Section 34 of the Act".

In connection with this Judgment also I may note that two of the learned Judges, who decided it, were responsible for the decision in *Commissioner of Income Tax, Burma* v. *U Lu Nyo*. I may further remark that *Ganeshdas, In re* and *Commissioner of Income Tax, Madras* v. *Krishna Chandra*, were cited before their Lordships of the Privy Council in *Rajendra Nath* v. *Commissioner of Income Tax, Bengal*, but were not animadverted upon or overruled.

I would accordingly hold that if an item of income is included in the return submitted by an assessee during a tax year but is left unassessed by the Income Tax Officer, or if assessed in the first instance the assessment is cancelled by any appellate or revisional authority, it escapes assessment within the meaning of Section 34 and the assessee can be legally served with a notice within one year of the end of that year.

In these circumstances, the answer to the question referred by the Commissioner under Section 66 (2) will be in the affirmative.

The question referred under Section 66 (1) need not be answered, as it does not arise.

ADDISON, Actg. C.J.—I have had the advantage of reading the judgment about to be delivered by my brother DIN MOHAMMAD, and, as I am in full agreement with it, I do not propose to discuss the question at length.

The assessee, Madan Mohan Lal, is also the Manager of a joint Hindu family. This reference deals with his individual assessment for the year 1931-32, for which he made a return on the 24th August, 1931, to the Income Tax Officer, dealing with his case. In the meantime another Income Tax Officer, dealing with the case of the joint Hindu family, came to the conclusion that all amounts received from the Delhi Cloth and General Mills, the principal source of the family's income, in the names of individual members of the family, was the income of the family and not of the individuals, except what was paid as salary. He, therefore, included in the family income commission, amounting to Rs. 79,543, which had been included by the assessee in his individual return. Upon this, the Income Tax Officer, having jurisdiction over the "individual" assessment, excluded that item from it, and assessed Madan Mohan Lal in his individual capacity upon Rs. 6,096, only, this amount being made up of Rs. 6,000 salary from the Mills, and Rs. 96, from other sources.

The joint Hindu family, of which the assessee is the manager appealed to the Assistant Commissioner of Income Tax. He allowed the appeal to the extent of excluding the sum of Rs. 79,543 from the "family" assessment. The Income Tax Officer issued notice under Section 34 of the Act upon the assessee in his individual capacity before the expiry of the financial year 1932-33 with respect to the item excluded from that family assessment. This notice was duly served and, if Section 34 applies, the notice was within time. No question of limitation, therefore, arises in this case.

On receipt of this notice, the return made by the assessee was as follows:—" Previous statement was complete—nothing was concealed—therefore there is nothing to add now." The Income Tax Officer then made an assessment upon the assessee as an individual with respect to the commission excluded from the family assessment. He fixed the additional sum to be assessed to income tax as Rs. 59,543 after allowing certain deductions claimed. The question is whether he could do so under Section 34 of the Act.

If that section is read as it stands, there appears to me to be no difficulty. It did " escape assessment " in his hands at first, if these words are given their ordinary meaning; and it was assessed under Section 34 within limitation. The assessment was, therefore, legal unless some restricted meaning must be given to the words "escaped assessment". *Commissioner of Income Tax, Burma* v. *U Lu Nyo*, is not in point, being clearly distinguishable, and all the other authorities in India take the view that the words should

be given their ordinary meaning, except *Kishen Kishore* v. *Commissioner of Income Tax, Punjab.* The learned Judges who decided that case gave no reasons for coming to the conclusion they did, and one of them was a member of the Bench, which decided *Ganesh Das In re,* from which the opposite view can be deduced. The matter was mentioned in *Burn & Co., In re,* but dot decided.

Reliance was, however, placed by the learned counsel appearing for the assessee on a decision of their Lordships of the Privy Council, *Rajendra Nath* v. *Commissioner of Income Tax, Bengal.* Admittedly that case is not on all fours with the present. What was decided in it was that an assessment can be made under Section 23 (1) of the Act more than a year, in fact at any time, after the assessment year, if in the meantime no final assessment has been made. But, as the appellant before their Lordships relied upon Section 34 of the Income Tax Act, they discussed those arguments and made some remarks on the section. Their remarks are at pages 290-291 of the Report and they must, in my judgment, be interpreted with reference to the arguments and the point which had then to be decided. The argument was that, if a final assessment order was not made within the tax year, the income tax authorities could not proceed to assess the income, as it had escaped assessment, except within the additional year allowed by Section 34. The principal question to be decided was, what was the meaning of the word "assessment" and whether it could take place after the tax year. The answer was that the final assessment order could be made at any time. In coming to this conclusion their Lordships observed as follows: "This involves reading the expression 'has escaped assessment' as equivalent to 'has not been assessed.' Their Lordships cannot assent to this reading. It gives too narrow a meaning to the word "assessment" and too wide a meaning to the word "escaped," that the word 'assessment' is not confined in the statute to the definite act of making an order of assessment appears from Section 66, which refers to the course of any assessment.

In my judgment, when their Lordships remarked that the expression "has escaped assessment" was not equivalent to "has not been assessed" they meant that the expression "has escaped assessment" can have no possible application to a case were the course of the assessment was not yet complete and there had in fact been no final assessment order and nothing more. They were more concerned with the meaning of the word assessment, to which they gave a wide interpretation than with defining the exact meaning of the word 'escaped'. All they finally held about the latter word was that it was not wide enough to include income, as to which no final assessment order had yet been made and as to which the assessment was still running its course. This pronouncement, therefore, cannot be interpreted as giving the restricted meaning to the words, which was given in *Kishen Kishore* v. *Commissioner of Income Tax, Punjab.*

The words "for any reason" in the beginning of Section 34 appear to me to widen the interpretation and not to narrow it, and to be of sufficient importance to be emphasised.

I would answer the first question referred by the Commissioner in the affirmative. The second does not arise.

DALIP SINGH, J.—The facts of this reference are given in the statement of the case by the Commissioner of Income Tax, Punjab. It seems that *Lala* Madan Mohan Lal had to be assessed both as an individual and as a *Karta* of the joint Hindu family of which he was the head. He made a return on the 24th August, 1931, in his personal capacity in which he included an item of about Rs. 79,543 as personal income. He also made a return on behalf of the joint Hindu family and the Income Tax Officer who was dealing with the joint Hindu family assessment included the item of Rs. 79,543, in the joint Hindu family income and made an assessment thereon. Thereupon the Income Tax Officer who was dealing with the assessment of *Lala* Madan Mohan Lal as an individual on the 7th March, 1932 assessed *Lala* Madan Mohan Lal as an individual on the return furnished by him but excluding the item of Rs. 79,543 on the ground that this item had been included and assessed in the hands of the Hindu joint family by the Income Tax Officer dealing with that case. The assessee naturally did not appeal from this order but he appealed from the order assessing this income as a portion of the joint Hindu family income. After various delays the Assistant Commissioner accepted the appeal and excluded this item from the income of the Hindu joint family holding that it was the personal income of the assessee. On the 31st March, 1933, a notice had been served on the assessee under Section 34 for a fresh return. This was before the decision of the appeal on the 17th April, 1933. It would seem that the income tax authorities anticipating the possible result of the assessee's appeal, took the precaution of issuing a notice to him to make a fresh return so as to be within the limitation imposed by Section 34 of the Income Tax Act. The assessee replied that he had already furnished a return and he had nothing to add thereto. The Income Tax Officer dealing with the personal case decided on the 13th February, 1934, that the item of Rs. 79,543 had escaped assessment and while accepting the return of the assessee he assessed him on this item. The assessee objected that Section 34 had no application and the income had not escaped assessment and the fresh assessment was made without jurisdiction. In appeal, however, the Assistant Commissioner upheld the order of the Income Tax Officer holding that the income had escaped assessment. The Commissioner was asked to state the case under Section 66 (2) of the Income Tax Act and he has stated the question in the first page of the printed paper book, namely, whether assessment was validly made under Section 34 of the Act upon the income in the circumstances given above. He has also under Section 66 (1) referred another question, namely,

'if the answer to the first question be in the negative, will there be any limitation of time (other than general reasonableness) upon an order to be duly made under Section 33 of the Act, in review of the initial assessment under Section 23 (3) and adding the said income thereto.' The Commissioner concedes that the second question is in regard to an order in contemplation and not in existence. No revision proceedings under Section 33 have apparently yet been taken. But he contends that in order to avoid multiplicity of proceedings the High Court might return an answer to this question also if the first question is answered in the negative.

So far as this last question is concerned I do not think there is any section which empowers the Commissioner to ask the advice of the High Court as to the legality of any proceedings that he intends to take. I do not think it would be proper for the High Court to express any opinion on the point because the point may never arise as the assessee may not ask for a reference on the point and secondly, because any decision or advice given by this Bench on a question not directly arising before it could not bind the Bench that subsequently heard the reference, if any, upon this question when it really did arise. I therefore do not think it would be proper to give any answer to this second question at all.

There remains, therefore, only the first question. Section 34 of the Income Tax Act has been the subject of interpretation by the Privy Council and I need hardly say that the judgment of the Privy Council if applicable must bind this Court. The short question before us is, whether in the circumstances detailed above the income can be said to have escaped assessment. The Privy Council decision referred to is printed as *Rajendra Nath* v. *Commissioner of Income Tax, Bengal* (I. L. R. 61 Cal. 285) and the facts of that case appear to be as follows and are stated in the judgment of their Lordships at pages 286 to 288. In that case there were two firms, Burn & Company and Martin & Company. The partners of Martin & Company acting as individuals purchased the shares of the partners of Burn & Company and thus became owners of Burn & Company. It appears that the partners had not purchased the business of Burn & Company with funds belonging to Martin & Company, but with other funds belonging to themselves as individuals and the intention of the purchasers was to embark on a separate venture unconnected with Martin & Company. The Income Tax Officer issued a notice to Burn & Company, calling for a return of their total income. On coming to know the fact of the purchase the Income Tax Officer combined the incomes of Burn & Company and Martin & Company and assessed them as one on the return made by Martin & Company. The return made by Burn & Company was not made the subject of any assessment order. Finally the High Court held that this was illegal. Accordingly the assessment order passed on Martin & Company was revised by the income tax authority excluding the income of Burn & Company. The income tax authority then proceeded to assess the income of

Burn & Company without taking any action under Section 34 merely treating the assessment as not having been completed and proceeding, therefore, under Section 23. The assessment having been made Burn & Company appealed to the Assistant Commissioner who, however, rejected the appeal and confirmed the assessment. They then asked for a reference to the High Court under Section 66 (2). Those questions are printed at page 288. The High Court answered the first and second questions in the affirmative and the third question in the negative. They held briefly that the Income Tax Officer could proceed under Section 23 (1) and it was not correct that the income having escaped assessment in any year the only remedy left to the income tax authorities was to proceed under Section 34. The assessees then appealed to the Privy Council and their argument is summarised by their Lordships of the Privy Council at page 290. They contended that the income had escaped assessment within the meaning of Section 34. They contended that the word 'assessment' meant the order of assessment and as no such order had been passed on the income within the tax year therefore that income had escaped assessment within that year and could only be assessed under Section 34 subject of course to the limitation of time imposed by that section. Their Lordships repelled the contention holding that what the assessee wanted them to do was to read the words 'has escaped assessment' as equivalent to 'has not been assessed.' Their Lordships held that this reading was not correct for two reasons. *It gave too narrow a meaning to the word 'assessment' and too wide a meaning to the word 'assessment.'* Their Lordships pointed out that in the statute the word 'assessment' is not confined to the act of making an order of assessment and they referred in particular to Section 66 which refers to 'the course of any assessment.' They further went on to say that an income which was returned for assessment and which was accepted as correctly returned though erroneously included in the assesssment of another company could not be said to have "escaped" assessment. Then occur the following words :—'The fact that Section 34 requires a notice to be served calling for a return of income which has escaped assessment, strongly suggests that income which has already been duly returned for assessment cannot be said to have escaped assessment within the statutory meaning. Their Lordships find themselves in agreement with the view expressed in *In re Lachhiram Basantlal* (I.L.R. 58 Cal. 909) by the learned Chief Justice : "Income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessee's income which have not yet terminated in a final assessment thereof. It may be that if no notice calling for a return under Section 22 is issued within the tax year then Section 34 provides the only means available to the Crown of remedying the omission but that is a different matter".

The question is, what did their Lordships of the Privy Council intend to hold by these words? It appears to me that the argument of the assessees which their Lordships repelled necessarily

involved for its repulsion the two reasons given by their Lordships. The word "assessment", according to their Lordships of the Privy Council, may be taken as equivalent to "the course of assessment" and not equivalent to "the order of assessment." If their Lordships had merely stopped with that remark then the argument of the assessees might have been that though the word 'assessment' may mean 'the course of assessment' yet as no order of assessment had been passed within the tax year on an assessment still proceeding, the income had escaped assessment in the sense that it had not been assessed in that year though it could not be said to have finally escaped assessment Their Lordships repelled that argument by the finding that the word 'escaped' was not to be read in the widest sense that that word is capable of bearing and it seems to me that their Lordships intended to hold that the word 'escaped' is equivalent to "eluded notice" in the course of assessment and did not mean 'had avoided being assessed.' Their Lordships state this in the beginning when they lay down that the assessees' argument involves reading the expression 'has escaped assessment' as equivalent to 'has not been assessed' and their Lordships cannot assent to this reading. It may be contended here that what their Lordships meant to hold was no more than that the word 'escaped' might include a case of the absence of an order of assessment as well as a case where the income in question had not figured in the order of assessment and all that their Lordships meant to lay down was that the absence of an order of assessment does not make an income escape assessment. But if this was the meaning of their Lordships it seems to me that the argument would have been put quite differently and that the words 'the fact that Section 34 requires a notice etc. that income which has already been duly returned for assessment cannot be said to have 'escaped assessment' would not have been employed at all. These words would be irrelevant to the argument. It would make no difference whether the income had or had not been included in the return or whether the return had or had not been accepted as correct. Their Lordships however lay stress on this. It seems to me, therefore, that their Lordships expressed by that judgment the view that I have endeavoured to state in other words above. After all in what sense can the income in the present case be said to have escaped assessment except in the sense that it has not been assessed. It figured in a return and that return has been accepted as correct. It figures in the final order of assessment and was rejected from assessment not because the attention of the Income Tax Officer was not directed to it but because he held that it had been, and presumably rightly assessed elsewhere. The only sense, therefore, in which it can be said to have escaped assessment is in the sense that it has not been assessed but this is the very meaning that their Lordships said was not the correct meaning of the words 'escaped assessment'. If this is so, then the case is concluded by the judgment of their Lordships of the Privy Council and that being binding on this Court, the income cannot be said to have escaped assessment in this case.

I would, however, for completeness point out that in *Lachiram Basantlal, In re*, to which ruling their Lordships referred with approval this very point which now arises was noticed as a possible way of disposing of that case but was expressly not decided. The argument for the Income Tax Commissioner appears to be something like this: an income has not escaped assessment while it is still in the process of assessment but it may be said to have escaped assessment when for any reason whatsoever it has not been assessed in the final order of assessment. This argument appears to me to involve the same meaning of 'escaped assessment' which their Lordships said was incorrect, namely, that the words, 'escaped assessment' are equivalent to 'has not been assessed' in the sense of not having been the subject of or not having been charged in the final order of assessment. I would also like to point out that the results of accepting the view taken by the Income Tax Commissioner would appear to be rather startling. Suppose a case where an income has been rejected from assessment on the ground mentioned in this case by the Income tax Officer, and by the Assistant Commissioner in appeal, and in revision by the Commissioner. No section provides any power to the Commissioner to review his own decision on the ground that he has made a mistake. Was it then the intention of the Legislature that the Commissioner could proceed to review his own order by ordering the Income Tax Officer to take action under Section 34? No doubt, if the Legislature has so expressly provided such a power could be given but surely more clear and express words would have been employed if that was the object of the Legislature. A reference was made to Section 125 of the English Income Tax Act. That section is completely differently drafted and it appears to me to throw no light on the present question at all. But if it did throw any light it would appear to me rather that the Legislature intended by the words 'escaped assessment' to refer to the cases given in the first two paras. of that section at most, that is, to cases of omission of the income by the default of the assessee and possibly by the omission of the Income Tax Officer. It is clear that the words "profits omitted" do not cover a case of this kind where the Income Tax Officer has rightly or wrongly given deliberation to the subject and has rejected the income from assessment on the ground that the income belongs to some person other than the assessee. If Section 34 was intended to mean, that whenever an income had not been assessed in a final assessment order owing to some mistake of fact or law by any income tax authority or by any omission or default on the part of the assessee, the income tax authority could review his previous decision or make a demand for a return on the assessee it seems to me that it could easily have been expressed in that manner. The section would then have run: "If for any reason income etc., chargeable to income tax has not been assessed in any year owing to any mistake of fact or law by the income tax authorities or by any omission or default on the part of the assessee or has been assessed

at too low a rate, the Income Tax Officer may in the first case review his decision after giving notice to the assessee and in the second case may serve on the person liable to pay tax on such income etc., a notice etc.' I may notice here one argument which occurs in a ruling reported as *Commissioner of Income Tax, Madras* v. *Krishna Chandra* (I. L. R. 49 Mad. 23). In that ruling it was held that a certain construction of Section 34 proposed by the assesssee was not correct because of the words 'has been assessed as too low a rate' which according to their Lordships could not be a matter of inadvertence but only of deliberate assessment made by the Income Tax Officer with knowledge of the facts and circumstances. This does not appear to me to be correct for there is one obvious case to which the reasoning does not apply in which the assessment may have been made at too low a rate, that is the case in which certain income has escaped assessment. If, for instance, the rate varies between Rs. 20,000, and Rs. 30,000 and the assessee was assessed at Rs. 20,000 and it subsequently became known that his proper income was Rs. 30,000 the result that has followed is (1) that he had not paid income tax on Rs. 10,000 which he did not mention in his return and also (2) has been assessed at too low a rate on the Rs. 20,000 which he did mention in his return. It appears to me, therefore, that the words 'has been assessed at too low a rate' do not throw any light on the meaning of the words 'has escaped assessment'. In fact if I may respectfully point out the ruling of their Lordships of the Privy Council that the words 'escaped assessment' are not equivalent to 'has not been assessed' receives support from the fact that the words 'has been assessed' are used in this very section upon the question of the lower rate. It would have been strange indeed if the Legislature intended that the words 'escaped assessment' should mean 'has not been assessed' and should not use that expression when it was inevitably suggested by the use of the words 'has been assessed' in the same sentence. It is clear from the judgment of the Privy Council that the world 'escape' is not to be given its widest meaning. I am unable to see how in this case the income can be said to have 'escaped assessment' unless the word is given its widest meaning. It is unnecessary for me to go into the various rulings which have been cited before us. They have been summarised in *Amir Singh Sher Singh* v. *Commissioner of Income Tax, Punjab*. This is the ruling whose conflict with *Kishen Kishore* v *Commissioner of Income Tax, Punjab* has occasioned the Full Bench reference. I may briefly remark that it does not appear to me that the words 'for any reason' can throw any light on the meaning of the word 'escape'. There is nothing to show that the intention of the Legislature was to shape Section 34 on the model of Section 125 of the English Act. I would, therefore, with great deference to the learned Judges who decided that case express my respectful dissent from the reasoning of that case. That case, however, on its facts is clearly distinguishable. It was a case of an Income-tax Officer wrongly deciding that a certain

deduction allowed should not have been allowed. Now, while Section 125 of the English Act appears to expressly provide for that case, for the reasons I have given, I do not think that the words "escaped assessment" cover that kind of case at all. It seems to me, further that the case was wrongly decided because 'assessment' means 'the course of assessment'. The course of assessment involves both the calculations of the income and the charging of the income. In order to 'escape assessment' an income must avoid both calculation and charging. In the case where a deduction has been wrongly allowed, the income has possibly escaped being charged, but has not escaped calculation. It is true that the arithmetical result is the same, but that is not the same thing as holding that the calculation never took place. I can see no distinction arising between a mistake of fact and a mistake of law on the part of the Income Tax Officer on the words of the Statute. If therefore this ruling were correct, it would be open to the Income Tax Officer to revise his decision on the ground of any mistake of fact or law. This appears to me to go beyond even the provisions of Section 125 of the English Act. It is opposed to the decision *Commissioner of Income Tax* v. *U. Lu Nyo*, which was conceded to be rightly decided by the learned counsel for the income-tax authority.

Lastly, I would point out that the remedy was entirely in the hands of the income-tax authorities on a different procedure. They knew that the Hindu joint family assessment was under appeal. The personal assessment could have been forwarded to the Appellate authority, the Assistant Commissioner, with the request that if he came to a different conclusion from the Income Tax Officer on the subject of the item in dispute, *viz.*, Rs. 79,543, the personal assessment should be revised under the powers conferred under Section 33 on the Commissioner. Now while it is possible that there might be an overlapping of powers conferred on different persons in a Statute, yet where the matter admits of doubt at least, the construction against overlapping of powers should be adopted ordinarily. I would, therefore, answer the first question referred by the Commissioner in the negative.

ORDER OF THE COURT.

By a majority of the Judges, the answer to the question referred under Section 66 (2) is the in affirmative. The second does not arise. No order as to costs.

Order accordingly.

[IN THE BOMBAY HIGH COURT.]

MADHAVJEE DAMODAR THACKERSAY AND ANOTHER (EXECUTORS)

v.

COMMISSIONER OF INCOME TAX, BOMBAY.

Beaumont, C.J., and Rangnekar, J.

INCOME TAX—INCOME ESCAPING ASSESSMENT—RE-ASSESSMENT—ASSESSEE WHETHER ENTITLED TO CLAIM RE-ASSESSMENT OF HEADS OF INCOME OVER-ASSESSED—INCOME TAX ACT (XI OF 1922), SECTION 34.

Under Section 34 of the Indian Income Tax Act it is income which has escaped assessment which can be subsequently charged and it is not, therefore, open to an assessee, when charged in that way, to re-open the whole assessment and to seek to be allowed credit in respect of some item which has been over-assessed, though it is open to him to show that income alleged to have escaped has in truth and in fact, not escaped assessment but has been brought in under some inappropriate head.

SATYENDRAMOHAN ROY CHOWDHURY *v.* COMMISSIONER OF INCOME TAX, BENGAL [1930] (I.L.R. 58 Cal. 326; 129 I.C. 405; A.I.R. 1930 Cal. 627; 4 I.T.C. 447), *followed.*

Case stated by the Commissioner of Income Tax, Bombay, under Section 66 (2) of the Indian Income Tax Act, XI of 1922 (Civil Reference No. 17 of 1933).

The necessary facts appear in the judgment. The questions referred were:—

(1) Whether in the circumstances of the case, the Income Tax Officer was correct in reassessing only such sources of income as he found had actually escaped assessment at the time the original assessment for the financial year 1931-32 was levied on 31st July, 1931;

(2) Whether there is anything in Section 34 of the Act which requires an Income Tax Officer to reassess income, profits or gains under any source which he finds to have not escaped assessment in any year;

(3) Whether the supplementary assessment levied in this case by the Income Tax Officer on 12th October 1932 is correct.

The Commissioner was of opinion that the answer to questions (1) and (3) should be in the affirmative and to question (2) in the negative. He said: "The assessees' contention is that income from interest was really only Rs. 55,211 and not Rs. 85,000 as originally estimated by the Income Tax Officer he should have reassessed it at the former figure. Section 34, however, clearly empowers an Income Tax Officer to reassess only income which has escaped assessment, and I submit that it does not empower him to revise his own decision and reduce the assessment of income escaping assessment." As regards income which has been over-assessed Sections 31, 32 and 33 of the Act contain provisions to enable an assessee to obtain redress."

Engineer with *Payne and Co.*, for the assessees.

The Advocate-General with the *Government Solicitor*, for the Crown.

JUDGMENT.

BEAUMONT, C. J.—In this case the assessees were assessed under Section 23 (4) of the Income Tax Act and in that assessment interest on securities were treated as Rs. 31 thousand and odd, dividends at Rs. 44 thousand odd and "other sources—Interest" at Rs. 85,000. Subsequently it transpired that interest on securities should have been Rs. 58 thousand odd instead of Rs. 31 thousand and odd and dividends should have been Rs. 68 thousand odd, instead of Rs. 44 thousand odd. The income tax authorities therefore proposed under powers conferred by Section 34 of the Act to levy tax on these two items so far as they had escaped assessment. The contention of the assessees is that the item "other sources—Interest" should have been assessed at Rs. 55 thousand and odd instead of Rs. 85,000, and they say that they should be allowed credit for the difference between these figures. Mr. Engineer has referred us to the decision of the Full Bench of the Calcutta High Court in *Satyendramohan Roy Chaudhuri* v. *The Commissioner of Income Tax, Bengal*, and I agree with the views there expressed, *viz.*, that under Section 34 of the Act it is income which has escaped assessment which can be subsequently charged and that it is not open to an assessee, when charged in that way to re-open the whole assessment and seek to be allowed credit in respect of some item which has been over-assessed but on the other hand it is open for an assessee to show that income alleged to have escaped assessment has in truth and in fact not escaped assessment but has been brought in under some inappropriate head. It seems to me, however, that this case falls within the first branch of that proposition and not the second branch. Here two items were brought definitely into the assessment, *viz.*, interest on securities, and dividends, and those two items were under-assessed, and to the extent to which they were under-assessed they have escaped assessment. There is nothing to show that the other item 'other sources—Interest' which includes interest on mortgages, bank deposits, and so forth, would have been assessed at a lower figure if the Income Tax Officer had had the right figure in respect of the interest on securities, and dividends. It seems to me, therefore, that this is a case in which certain items have escaped assessment, although it is true that another item has been overassessed. But credit cannot be given to the assessee in respect of the latter item. I think, therefore, that we must answer the questions propounded to us in the same manner as the learned Commissioner, that is questions Nos. 1 and 3 in the affirmative and question No. 2 in the negative. Assessees to pay the cost of the Commissioner on the original side scale to be taxed by the Taxing Master.

RANGNEKAR, J.—I agree.

Reference answered accordingly.

[IN THE BOMBAY HIGH COURT.]

COMMISSIONER OF INCOME TAX, BOMBAY

v.

C. MACDONALD & CO.

Beaumount, C.J., and Rangnekar, J.

September 11, 1934.

INCOME TAX—'PROFITS'—AGREEMENT BY ASSESSEE TO PAY SHARE OF INCOME TO THIRD PARTY—SUMS SO PAID, WHETHER DEDUCTIBLE—INDIAN INCOME TAX ACT (XI OF 1922), SECS. 4, 10.

The assessees were the managing agents of a company and in respect of the year of assessment they received as such agents the sum of Rs. 97,000. From this amount they had to pay Rs. 19,000 odd to third parties under certain agreements to pay them a proportion of the gross income and they claimed that in assessing their profits they were entitled to have a deduction of this sum of Rs. 19,000 odd from the sum of Rs. 97,000 received by them: Held, *following the principle laid down in the* Pondicherry Ry. Co.'s case, *that the assessees were not entitled to have this sum of Rs. 19,000 deducted. The fact that the obligation to pay was based on the gross income and not on the net profits as in* Pondicherry Ry. Co.'s case *did not affect the question.*

PONDICHERRY RY. CO. *v.* COMMISSIONER OF INCOME TAX, [1931] (I.L.R. 54 Mad. 691; 132 I.C. 619; A.I.R. 1931 P.C. 165) *applied.*

BEJOY SINGH DUDHURIA *v.* COMMISSIONER OF INCOME TAX, BENGAL [1933] (I.L.R. 60 Cal. 1029; 143 I.C. 145; A.I.R. 1933 P.C. 145) *distinguished.*

Reference made by the Commissioner of Income Tax, Bombay under Section 66 (2) of the Income Tax Act [Civil Reference No. 6 of 1934].

F. J. Coltman, for the assessees.

Jamshed Kanga and *G. Louis Walker,* for the Commissioner.

BEAUMONT, C.J.—This is a reference by the Commissioner of Income Tax made under Section 66 (2), Income Tax Act, 1922, raising the questions, (1) whether in the circumstances of the case and in view of the provisions of Sections 4 (1) and 10 of the Act the assessees have been correctly assessed on the total amount of Rs. 97,882 received by them as profits and gains of the business carried on by them as managing agents of a certain company; and (2) whether under the provisions of Section 10 of the Act, or under any other provision of law, the assessees are entitled to have a deduction from their income liable to tax of the amount of Rs. 19,576 paid by them out of their earnings to certain parties as per the declaration, Exhibit G. The questions arise in this way. The assessees are the agents of the Katni Cement and Industrial Company Limited; and in respect of the year of assessment they received as such agents the sum of Rs. 97,000 odd referred to in the question. But it appears that from that sum

they have paid away to third parties the sum of Rs. 19,000 odd referred to in the second question. Those sums were paid under the agreement, which is Exhibit F, and the question is whether the assessees are liable to be assessed in respect of their income so paid away to third parties. It has not been argued that the sums paid to third parties come within any of the various deductions allowed by the Indian Income Tax Act. But the argument has been that the sums paid to third parties never were the income, profits or gains of the assessees within the meaning of Section 4 of the Act. The Income Tax Commissioner relies on a decision of the Privy Council, *Pondicherry Railway Co.* v. *Commissioner of Income Tax, Bombay*, in support of his view that assessees are liable to be assessed in respect of the whole sum of Rs. 97,000 odd received by them. In that case the Pondicherry Railway Company were liable to pay to the French Government half of the net profits made by them from their undertaking, and it was held that they were liable to be assessed for tax under the Indian Income Tax Act in respect of the whole of their net profits, and could not deduct from their income the proportion paid away to the French Government. It seems to me that the principle of that decision covers the present case.

The only distinction suggested by Mr. Coltman is that in that case the amount to be paid away was a proportion of the net profits, whereas here it is a proportion of the income. But whether the obligation to pay is based on the gross income or on the net profits cannot in my view affect the question. I think therefore that the case is really covered by that decision. But Mr. Coltman, in support of his contention that the sum paid to third parties is not part of the income of the assessees, has relied on a decision of the Privy Council, *Raja Bejoy Singh Dudhuria* v. *Commissioner of Income-tax*. In that case the assessee was in receipt of income from immovable property, and that property and the income therefrom were subject to a charge for maintenance in favour of the assessee's step-mother, and it was held by the Privy Council that the sums paid to the step-mother in respect of this charge never constituted part of the income, or what the Privy Council call, the real income, of the Raja liable to assessment under the Act. I am not sure that I follow very clearly the distinction which the Privy Council found between the two cases, the *Pondicherry case* and *Raja's case*, but the facts of the present case are clearly much closer to the facts in the *Pondicherry case* than to those in the *Raja's case*, because in the *Raja's case* there was a charge on the property, whereas in the present case as in the *Pondicherry case*, there is no charge, there is only a covenant to pay. It seems to me therefore that it is the *Pondicherry case* which governs the case before us, and we must follow that case. The questions therefore will be answered, No. 1 in the affirmative and No. 2 in the negative. Costs to be paid by the assessees on the original side scale to be taxed by the Taxing Master.

RANGNEKAR, J.—I agree and have nothing to add.

[IN THE HIGH COURT OF MADRAS.]

BALAJI RAO

v.

COMMISSIONER OF INCOME TAX, MADRAS.

Beasley, C.J., Ramesam and King, JJ.

December 5, 1934.

SALARIES—GRATUITIES—GRATUITY PAID AFTER TERMINATION OF SERVICE—ASSESSABILITY—INDIAN INCOME TAX ACT (XI OF 1922), SECTION 7 (1).

A gratuity is made assessable to income tax by Section 7 (1) of the Indian Income Tax Act, and there is no justification for excluding from the scope of Section 7 (1) gratuities paid after the period of employment has come to an end.

Case stated by the Commissioner of Income Tax, Madras, under Section 66 (2) of the Indian Income Tax Act (O. P. No. 207 of 1933).

S. Panchapakesa Sastri, for the assessee.

M. Patanjali Sastri, for the Commissioner.

JUDGMENT.

The question referred to us is :—"Whether the sum of Rs. 11,781 paid as gratuity by the bank under its Provident and Gratuity Fund Rules is income assessable to tax under sub-section (1) of Section 7 of the Act."

The facts of the case are sufficiently plain from the question framed. It is contended before us on behalf of the assessee that, as this gratuity was paid by the bank to him after his retirement, it is not assessable to income tax under Section 7 (1). This is an argument which we are quite unable to follow. We are invited to draw a distinction between gratuity paid to an employee during his employment and that paid to a former employee after the period of his employment has come to an end. There is no warrant whatever in the Act for drawing any such distinction. A gratuity is definitely made assessable to income tax under Section 7 (1) of the Act under the head "Salaries" and we see nothing whatever to support or warrant the argument presented to us that it is to be limited in the way in which we are invited to limit it. The answer to the question propounded must, therefore, be in the affirmative. Rs. 250 costs to the Commissioner of Income Tax.

Reference answered in the affirmative.

[IN THE BOMBAY HIGH COURT.]

AMARCHAND MADHAVJI & CO.

v.

COMMISSIONER OF INCOME TAX, BOMBAY

Beaumont, C.J., and Rangnekar, J.

March 25, 1935.

FIRM—BAD DEBT DUE FROM RETIRED PARTNERS—DEBT WRITTEN OFF AS IRRECOVERABLE—LOSS WHETHER CAPITAL LOSS OR LOSS OF REVENUE.

There were six partners in a firm. Four of them retired before Samwat *1984 and the debts due to the firm by the retiring partners were treated as debts to due to the firm constituted by the remaining partners. In the* samwat *year 1987, the balance of debts remaining due amounting to Rs. 55,694, was written off as irrecoverable and the assessees claimed a deduction of the amount thus written off in computing the assessable profits. On a reference by the Commissioner :* Held, *that the debts due from the retiring partners were never revenue of the continuing firm and they were never brought into the income tax accounts as revenue. They were capital sums and the loss could not be written off as against the revenue of the year in which they were lost, that is, of the year when they were written off.*

Case stated by the Commissioner of Income Tax, Bombay under Section 66 (2) of the Indian Income Tax Act (XI of 1922) (Civil Ref. No. 8 of 1934).

O'Gorman, for the assessees.

Advocate General, for the Commissioner.

JUDGMENT.

BEAUMONT, C. J.—In this case the Commissioner of Income Tax has referred two questions for our decision under Section 66 (2) of the Indian Income Tax Act. The first question is, " Whether there is any provision in Section 10 of the Income Tax Act or any other section thereof under which a deduction could be allowed from the income of the firm liable to the tax, in respect of the four sums of money referred to in paragraph 2 above aggregating in all to Rs. 55,694, on account of moneys due from its former partners." The facts are that the year of assessment is the year 1932-33, that is, the year expiring on the 31st March, 1933, and the " previous year ", as that expression is defined in Section 2 Clause (11) is the *Samwat* year 1987.

During the year of assessment and during the previous year there were two partners in the assessee firm. But it appears that in former times there were four other partners. One of them retired in the *Samwat* year 1982, one of them at the end of the *Samwat* year 1983, and two of them at the end of the *Samwat* year 1984, and on their retirements they owed large sums of money to the firm of which they were partners and those sums seem to have been treated as due to the continuing partners, that is to say, to the new firms constituted on their several retirements. Part of those sums were eventually recovered, but in the *Samwat* year 1987, the balance of the debts amounting to the sum of Rs. 55,694 referred to in the 1st question was written off as irrecoverable. The question is whether that sum can be allowed as a deduction from income liable to tax. In my opinion it is quite clear that the answer to the question must be in the negative. These debts due from previous partners were never revenue of the continuing firm and they were never brought into the income tax accounts as revenue. They were capital sums and all that had happened in the *Samwat* year 1987 was that the firm lost part of its capital assets. There is no ground on which that loss can be written off against revenue of the year in which the loss finally occurred.

The second question relates to interest on the sums in question, and on the facts I have some difficulty in seeing how any question really arises. It appears that interest on these debts was brought into the income tax accounts for the *Samwat* year 1983, but since that no income tax has been charged on any interest partly because in subsequent years there were losses and not gains. In the *Samwat* years 1986 and 1987 it appears that no charge was made against the debtors for interest and certainly for the 'previous year' with which we have to deal, *Samwat* year 1987, no interest was brought into account for income tax purposes on these debts. All that has really happened as it seems to me is that the assessee firm has lost an asset which at one time produced revenue, but now produces no revenue, and I can see no ground on which any deduction can be allowed on that account.

I think, therefore, that both questions must be answered in the negative. Costs on the original side scale to be taxed by the taxing master to be paid by the assessee.

RANGNEKAR, J.—I agree.

Questions answered in the negative.

[IN THE HIGH COURT OF MADRAS.]

RM. AR. AR. RM. ARUNACHALAM CHETTIAR & SON

v.

COMMISSIONER OF INCOME TAX, MADRAS.

Beasley, C. J., Cornish and Pandrang Row, JJ.

March 20, 1935.

INTEREST ON SECURITIES—SALE OF SECURITIES BEFORE RECEIVING INTEREST THEREON—INTEREST INCLUDED IN SALE PRICE RECEIVED FROM PURCHASER—INTEREST THUS RECEIVED BY VENDOR, WHETHER ASSESSABLE AS 'INTEREST ON SECURITIES' OR 'INCOME FROM BUSINESS'—INDIAN INCOME TAX ACT (XI OF 1922), SECTIONS 8 AND 10.

The assessees who had dealings in the purchase and sale of Government securities purchased some Government of India Treasury Bonds at par for one lakh of rupees on September 30, 1931. Interest on the Bonds was payable half yearly on March 15 and September 15 and was liable to income tax. On March 30, 1932 before receiving the interest which had accrued on March 15, 1932, the assessees sold these bonds to another for Rs. 1,04,737-5-0. This amount was arrived at by adding to the nominal value of the bonds, namely, Rs. 1,00,000, the amount due by way of premium Rs. 1,812-8-0, interest for the half year ending March 15, 1932 to the date of sale Rs. 270-13-0. The question referred being whether the sum of Rs. 3,250 thus received by the assessees was interest on securities taxable under Section 8 of the Indian Income Tax Act, or a receipt of business to be brought into the computation of the income taxable under Section 10: Held, *that the sum in question was a receipt of the assessees' business which should be brought into the computation of their income taxable under Section 10.*

Case stated by the Commissioner of Income Tax, Madras under Section 66 (2) of the Indian Income Tax Act, XI of 1922. [O. P. No. 7 of 1935].

The facts are stated in the Reference made by the Commissioner of Income Tax, which runs as follows :

STATEMENT OF CASE.

"I have the honour to refer the following case for the decision of the Honourable the Judges of the High Court under Section 66 (2) of the Indian Income Tax Act (XI of 1922) (hereinafter referred to as the Act).

2. The petitioner is the manager of a Hindu undivided family carrying on money-lending and other businesses at various places both within and without British India, among them being Devakotta in Ramnad District and Colombo in Ceylon.

3. The reference arises out of the inclusion in the assessment of the petitioner for the year 1932-33 (previous year.........official year 1931-32) of a sum of Rs. 4,552 under the head " business ". The facts relating to this item are as follows :

The accounts of the petitioner's business at Colombo showed that he had purchased in British India through the Mercantile Bank, Bombay, on the 30th September, 1931 (as for 15th September, 1931) 6½ per cent. 1935 Government of India Treasury Bonds at par for a lakh of Rupees. The interest on these bonds was payable half yearly on the 15th March, and 15th September and was liable to income tax. The petitioner retained these bonds till 30th March, 1932 but did not receive the interest that fell due on 15th March, 1932. On 30th March, 1932 he sold the bonds in British India to the V.K.R.S.T. Firm, Madras for Rs. 1,04,737-5-0. The sale price was arrived at as below :—

Nominal value of the bonds.		Rs. 1,00,000-0-0
Amount due by way of premium at Rs. 1-13-0 per bond of Rs. 100		Rs. 1,812-8-0
Interest from 15th September, 1931 to 14th March 1932 payable on 15th March, 1932	Rs. 3,250-0-0	
Interest from 15th March, 1932 to 30th March, 1932 the date of the sale at 6½ p. c. per annum (rate given in the bond)	Rs. 270-13-0	
Total	3,520-13-0	
Less income tax on Rs. 3,520 at the maximum rate	596-0-0	
	2,924-13-0	
Total		1,04,737-5-0

The petitioner incurred an expenditure of Rs. 184-8-0 in purchasing and selling these bonds. The net profit on the transaction thus comes to Rs. 4,552-13-0, *i.e.*, Rs. 1,01,737-5-0 minus Rs. 1,00,184-8-0. The interest due on the bonds for the half year ended 14th March, 1932 was drawn from the Government Treasury by the V. K. R. S. T. Firm on 9th May, 1932 and this interest will be included in the assessment of that firm's income. Under Section 18 (3) of the Act, income tax was deducted from the interest when it was paid to that firm and under Section 18 (9) and Rule 13 a certificate showing the amount of tax deducted and other particulars was issued to them. A copy of the certificate is filed—marked Exhibit (A). Under Section 18 (5) of the Act, credit will be given in the assessment of the V.K.R.S.T. Firm for the amount of tax shown in the certificate.

4. Besides the transactions relating to the purchase and sale of the Government securities now in question, the petitioner had dealings in Government of India Treasury Bills worth Rs. 16½ lakhs during the same year and these resulted in a profit of Rs. 25,756 which was assessed under "business". In the subsequent year also, the petitioner purchased Government of India bonds for Rs. 2,58,635 and sold them for Rs. 2,66,719 deriving a net profit of Rs. 7,751.

5. In deciding an appeal preferred by the petitioner under Section 30 of the Act, the Assistant Commissioner, Southern Range, dealt with the profit mentioned in paragraph 3 above as follows. He treated Rs. 3,250 as "interest on securities" taxable under Section 8 this being the equivalent of interest on the bonds for the six months ending 14th March, 1932, and Rs. 1,628 (Rs. 1,812-8-0, the premimum on the bonds at Rs. 1-13-0 per bond of Rs. 100, less Rs. 184-8-0, expenses for sale) as profits derived from the dealings in securities, and assessable under the head "business". The sum of Rs. 270-13-0, being the equivalent of the interest for the period 15th March, 1932 to 30th March, 1932, he excluded from the assessment. The Assistant Commissioner further directed the Income Tax Officer to give credit for the tax deducted at the source from the sum of Rs. 3,250 which he had treated as "interest on securities". An extract of the Assistant Commissioner's order is filed, marked Exhibit (B).

6. In pursuance of the appellate order the Income Tax Officer called upon the petitioner to produce the certificate of

deduction of tax on the sum of Rs. 3,250, prescribed by Section 18 (9) of the Act and Rule 13 of the Indian Income Tax Rules, 1922 as required by paragraph 3 of Note 2 of the Form prescribed by rule 19 of the said rules. The petitioner failed to produce the certificate before the Income Tax Officer, who therefore did not give credit for the tax said to have been deducted.

7. The petitioner then applied to me for a revision of the assessment under Section 33 of the Act and contended:

(1) that the sum of Rs. 3,250 was interest on the bonds for the 6 months ending 14th March 1932, that it had become due and receivable on 15th March, 1932, that he had received this interest (less tax) from the purchaser (the V. K. R. S. T. Firm), that since this sum had been assessed to tax, credit should have been given under Section 18 (5) of the Act for the tax deducted at source (or in the alternative that the sum should have been deducted from the total income to arrive at the income to be taxed);

(2) that the production of a certificate issued under Section 18 (9) was not a necessary preliminary to the grant of this relief; and

(3) that the profit derived from the sale of the securities was of a casual nature and should therefore be excluded from the assessment.

I considered that the sum of Rs. 3,250 was not "interest on securities" assessable under Section 8 but was part of the price received by the petitioner for the securities. I therefore ordered under Section 33 of the Act that the sum of Rs. 3,250 should be eliminated under "interest on securities" and that the profit arising from this transaction should be put down at Rs. 4,552 instead of the figure Rs. 1,628 adopted by the Assistant Commissioner. A copy of my order under Section 33 is filed, marked Exhibit (C).

8. The petitioner now requires me under Section 66 (2) of the Act (as amended by Act XVIII of 1933) to refer to the High Court 2 questions arising out of my order under Section 33. I accordingly refer these questions (as reframed by me with the consent of the petitioner) for the decision of the High Court :—

Question (1). "Whether the sum of Rs. 3,250 received by the petitioner was interest on securities taxable under Section 8

of the Act, or a receipt of his business to be brought into the computation of the income taxable under Section 10".

Question (2). "If it was interest on securities, was it necessary for the petitioner to produce the certificate issued under sub-Section 9 of Section 18 in order to claim a set off under sub-Section (5) of that section."

9. *Question* (1). The petitioner's contention is that the sum of Rs. 3,250 was the interest payable by the Government of India in respect of these securities on 15th March, 1932, and that this interest was "receivable by him" in terms of Section 8 because he was the owner of the securities on and after that date, and could have received it if he had chosen to apply to the Treasury for payment. He therefore claims that this sum should be classified as "interest on securities" and that he should be given credit in his assessment for the tax leviable by deduction under Section 18 (3).

Under Section 18 (5) credit has to be given for "any deduction made in accordance with the provisions of this section." The deduction of Rs. 596 included in the calculation set out in paragraph 3 above was not made under the authority of Section 18 or of any section of the Act. It is evident therefore that this is not a sum for which credit can be given to the petitioner under Section 18 (5).

Although "interest receivable" is the subject of taxation such interest does not become the income of any person, and as such liable to taxation, until that person actually receives it. This is to be inferred from the language of Section 18, which provides that tax is to be deducted at the *time of payment* of the interest, and that *at that time* a certificate is to be issued to the *person to whom the interest is paid.*

The sum of Rs. 3,250 being interest on securities was receiveable and received by the V. K. R. S. T. firm, to whom the petitioner sold the securities. In my opinion this was income of that firm, and the tax deducted at the time of payment should be credited to them under Section 18 (5).

The petitioner received an equivalent sum (less a sum equivalent to the tax deductible from V. K. R. S. T. Firm, and this was part of the price paid to him for the securities. It was in my opinion money received by him in the course of a business operation conducted in British India. He claims that he is "not a regular dealer in the purchase and sale of Government

securities", but this seems to be contradicted by his own statement contained in the petition preferred to me under Section 33: "The petitioner deals in Government securities, buys when he can and sells at advantageous times. The scope of his business is not merely using moneys in money-lending but also in laying out on Government promissory notes". Taking into consideration the facts mentioned in paragraph 4 above, I consider that the sale of these securities was part of the petitioner's ordinary business, and I find accordingly. It follows that the sum of Rs. 3,250 was rightly brought into the computation of the income taxable under Section 10.

10. *Question* (2)—Under Section 48 (1) a person claiming refund in respect of dividends is required by law to produce a certificate issued to him under Section 20. In Section 48 (3), which deals with the grant of refund in respect of interest on securities, there is no corresponding provision requiring the production of the similar certificate issuable under Section 18 (9). Nor is there anything in sub-Section (5) of Section 18 making it legally incumbent on the person claiming the benefit of that sub-section to produce a certificate issued under sub-Section (9). In this case one of the reasons why sub-Section (5) could not be applied was that the petitioner could not produce a certificate issued under sub-Section (9), the certificate having been issued to and retained by the V. K. R. S. T. Firm. The petitioner's case is that it is not a valid reason because there is nothing in the Act which requires him to produce the certificate. The fact remains however that the credit to be allowed under sub-Section (5) is in respect of "any deduction made in accordance with the provisions of this Section". It was necessary therefore for the petitioner to prove that a deduction in accordance with the section had been made, and it is difficult to see how he could do that except by the production of the certificate. It appears to me that it is necessary in the circumstances of this case for the petitioner to produce the certificate. The question raised is not perhaps strictly one of law but I have thought it best to refer it since the petitioner bases his contention on the absence of any definite provision in Section 18 (5) corresponding to that in Section 48 (1)".

M. Subbaraya Iyer, for the assessees.

M. Patanjali Sastri, for the Commissioner.

JUDGMENT.

The only question argued here is question No. 1 referred by the learned Commissioner of Income-tax, that is, whether the sum of Rs. 3,250, received by the petitioner was in respect of securities taxable under Section 8 of the Act or a receipt of his business to be brought into computation of the income taxable under Section 10. The facts of this case are very clearly stated in the order of reference and the learned Income Tax Commissioner has very clearly also stated his reasons for his opinion that this sum is to be treated as a receipt of a business income which falls to be brought into the computation of the income taxable under Section 10. With those reasons we fully agree and we accordingly answer the latter part of the question propounded in the affirmative and direct the assessee to pay Rs. 250 costs of the Commissioner of Income Tax.

Reference answered accordingly.

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[In the King's Bench Division.]

SMITH (INSPECTOR OF TAXES)

v.

YORK RACE COMMITTEE.

Finlay, J.

December 20, 1933.

Income Tax—Racecourse Property—Area not Covered by Buildings—Proprietors Assessable to tax in Respect of Occupation under Schedule B—Exception—Building Occupied for Carrying on a Trade—Lawns, Paddocks and Enclosures not a "Building"—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Schedule B, Rule 1, Proviso (b).*

The appellants, who were racecourse proprietors, were the occupiers under a lease for thirty-five years of property which consisted of stands, stables, weighing-room, paddocks, lawns and enclosures. Those properties, which were enclosed, comprised a total area of eleven acres, about three of which were covered by buildings such as stands, stables and weighing-room. The whole area was occupied for the purpose of the appellants' business as racecourse proprietors, the profits of which were charged to income tax under Schedule D. On a claim by the Crown that the appellants were assessable to tax under Schedule B in respect of their occupation of that part of the eleven acres not covered by

* Income Tax Act, 1918, Schedule B, Rule 1 ; Tax under this Schedule shall be charged in addition to the tax to be charged under Schedule A on all the properties in this Act directed to be charged to the said tax according to the general rule of No. 1 of Schedule A : Provided that there shall not be charged under this Schedule —(*a*) . . . (*b*) any warehouse or other building occupied for the purpose of carrying on a trade or profession."

buildings :—Held, *that the paddocks, lawns and enclosures were not such adjuncts to the buildings as to fall within the description " other building occupied for the purpose of carrying on a trade or profession " so as to be exempt from Schedule B assessment under proviso* (*b*) *of Rule 1 of Schedule B, and the appellants were therefore assessable under Schedule B in respect of that part of the area not covered by buildings.*

Case stated by the Commissioners for the General Purposes of the Income Tax for the city of York.

At a meeting of the Commissioners held on March 4, 1932, the York Race Committee (hereinafter called " the Committee ") appealed against an assessment of £ 113, being one-third of the estimated annual value, made upon the Committee under Schedule B of the Income Tax Act, 1918, for the year ending April 5, 1930, in respect of the occupation of lands, tenements, hereditaments and heritages, situated on the Knavesmire, within the city of York. The Committee had for many years carried on the trade of racecourse proprietors on the Knavesmire, York.

For the year ending April 5, 1930, the Committee was the occupier of properties which consisted of stands, stables, weighing-room, paddocks, lawns and enclosures, situated on the east side of the racing track near the finishing post, and held under a lease for thirty-five years from January 1, 1908, granted by the York Corporation under the York (Micklegate Strays) Act, 1907, as amended by an agreement dated December 14, 1922. The whole of these properties were enclosed and had an extent of approximately eleven acres, part of which, of a total area of approximately three acres, was covered by buildings such as stands, stables and weighing-room. The whole was occupied for the purpose of the Committee's trade of racecourse proprietors, the profits of which had been charged to income tax under Schedule D.

The Committee, as occupier of the above-mentioned properties, was assessed to income-tax under Schedule A in the sum of £ 3,200 gross, for the year ending April 5, 1930, and was also rated as occupier for local rating purposes.

The question of the amount of the Schedule B assessment was reserved, the appeal heard by the Commissioners being

confined to the issues whether on the facts of the case any assessment at all under Schedule B was due to be made. It was however, explained to the Commissioners that the amount of £ 113 assessed was intended to represent one-third of the annual value of the properties after exclusion therefrom of the stands, stables, weighing-room and other buildings, leaving only the paddocks, lawns and enclosures of a total area of approximately eight acres, of which the paddocks, garden and grass in front of stands and enclosures comprised approximately five acres, the remainder being yards and roads of gravel or macadam comprising approximately three acres. None of the grass was suitable for grazing, there being steps and obstacles of various kinds. The ground was not flat, the whole of the paddocks, for instance, being terra-planed from the back wall to the track. The properties in question were well known to the Commissioners who heard the appeal.

The secretary of the Committee, who represented it at the appeal, reviewed the rules of the Jockey Club with which the Committee were bound to comply as a condition of obtaining a licence from the Jockey Club. The Commissioners were informed that the Jockey Club did not merely confine its attention to the suitability of the track and accommodation necessary for horses and jockeys, but also supervised the general lay-out of the buildings, stands and enclosures, and the amenities provided for race-goers. No plans could be passed which showed tunnels or congested places, and the provision of open spaces round the stands was compulsory. The rules required the provision of a paddock, and all horses running were required to be brought in whenever a charge was made for the admission of the public to the paddocks.

It was contended: (*a*) That the exception in favour of "any warehouse or other building occupied for purpose of carrying on a trade or profession" covered not only the buildings themselves, but also the paddocks, lawns and enclosures in the same curtilage as the buildings, those adjuncts being essential to the Committee's trade and the whole being used for the purpose of racing. (*b*) That in the circumstances of the case there was no liability to assessment to income tax under Schedule B in respect of the properties referred to.

It was contended on behalf of the Crown, *inter alia*: (*a*) That the whole of the properties comprised in the Schedule A assessment were liable also to assessment under Schedule B, subject only to the exception in proviso (*b*) to Rule 1 of Schedule B in favour of "any warehouse or other building occupied for the purposes of carrying on a trade or profession." (*b*) That the exception aforesaid applied only to buildings such as the stands, stables and weighing-room, and did not extend to the substantial areas of paddocks, lawns and enclosures. (*c*) That, subject to the question of its amount, the assessment under Schedule B should be confirmed.

The Commissioners considered that the interpretation of Schedule B, Rule 1, proviso (*b*), contended for on behalf of the Race Committee was correct, and that the paddocks, lawns and enclosures fell within the description "other building occupied for the purpose of carrying on a trade or profession." They therefore allowed the appeal and discharged the assessment.

The Crown appealed. The only question for the opinion of the Court was whether the Commissioners had rightly interpreted the words "other building occupied for the purpose of carrying on a trade or profession" in proviso (*b*) as applying to the paddocks, lawns and enclosures occupied by the York Race Committee.

The Solicitor-General (*Sir Donald Somervell, K. C.*), and *R. P. Hills*, for the Crown.

Latter, K. C., and *Bowe*, for the respondents.

FINLAY, J.—This case certainly is not entirely free from difficulty, but I have arrived at the conclusion that the decision reached by the Commissioners cannot be supported. The case relates to a dispute between the Revenue and a body called the York Race Committee, who conduct race meetings from time to time on a well known racecourse at York. The facts are found in a series of paragraphs in the case, and the substance of the thing is this: There is, of course, the racecourse itself; there is, equally of course, the paddock—in this case, I think, two paddocks—and there are, as is usually the case (although I suppose it is not absolutely essential to a racecourse) a number of buildings, stands, refreshment rooms and things of that sort, which

are attached to the course and form part of the property of the York Race Committee.

The case finds that the various properties—stands, stables, weighing-room, paddocks, lawns and enclosures—covered an area of approximately eleven acres. Of those eleven acres, three acres were covered by buildings, stands, stables and weighing-room, and the whole eleven acres, it is found, were occupied for the purpose of the Committee's trade of racecourse proprietors, and, of course, in respect of the profits of their trade they, like everybody else, are chargeable to Schedule D of the Income Tax Act.

The question that arises is with reference to that part of the eleven acres which is not covered by buildings, that is to say, about eight acres, consisting of paddocks, lawns and enclosures. The question which arises is with regard to assessment to Schedule B. The general rule of Schedule B is to be found at p. 421 of *Dowell's Income Tax Laws* (9th edn.), and the tax is imposed "in respect of the occupation of all lands, tenements, hereditaments, and heritages in the United Kingdom." On p. 430 is to be found an exception; something is taken out of the tax, and the question which arises in this case is whether the York Race Committee bring these things—paddocks, lawns and enclosures within the things to be taken out. I think it is worth just reading the two things which are excepted: "Provided that there shall not be charged under this Schedule—(*a*) any dwelling-house or the domestic offices thereunto belonging, unless occupied, by virtue of one and the same demise, together with a farm of lands, or with a farm of titles, for the purpose of farming the same; or (*b*)"—and this is the one with which we are immediately concerned—"any warehouse or other building occupied for the purpose of carrying on a trade or profession."

At first sight the matter looks perfectly simple. There is for instance, a lawn—quite a large lawn—and one says, "well, whatever that lawn may be, it certainly is not a building." The matter seems quite simple, but it has been argued, and the argument is one which deserves careful consideration, in this way: it is said that the Commissioners made no error in law; it is said that, having regard to the construction which ought to be put upon the words "any warehouse or other building," the

Commissioners were entitled to arrive at the conclusion that "building" meant not merely, so to speak, the four walls, but meant adjuncts, courts and things of that sort occupied with the building and for the necessary use of the building; and it is said that whatever criticism one might think the view of the Commissioners in this case was open to, nevertheless it was, on a correct application of the law, a finding of fact and that this Court could not, therefore, interfere.

The first thing to ascertain is whether the Commissioners did correctly direct themselves in point of law. I think the direction they gave themselves is to be got from the case, because it is there said that the Commissioners considered that the interpretation contended for on behalf of the Race Committee was correct. That interpretation is expressed in this way: "That the exception in favour of 'any warehouse or other building occupied for the purpose of carrying on a trade or profession' covered not only the buildings themselves, but also the paddocks, lawns and enclosures in the same curtilage as the buildings, these adjuncts being essential to the Committee's trade and the whole being used for the purpose of racing." It seems to me there that the contention that was being put forward was that if you found a building, and if you also found a lawn, that lawn being used, as the building was used, for the purpose of the trade of conducting race meetings, then both lawn and building fall within the exception. That cannot possibly be right. To take the instance of the lawn—that will do as well as any other; there are other instances which could be taken—it is perfectly clear that it is not sufficient that the lawn should be used for the purpose of the trade. What is essential is that the lawn should be a building, and, putting the contention as favourably as it can be put, I think, for the York Race Committee, all that could be said would be that "building" must cover adjuncts, that is to say, a courtyard or something of that sort necessarily used in connection with the building. The view which the Commissioners accepted is not merely wider, but infinitely wider than that.

That leads me to notice an argument which was urged before me here. It was said that a generous construction must be given to the word "building," otherwise double taxation would

arise. Two answers were given by the Solicitor-General. The first answer seems to me to be clearly right, and I mention it now because it really arises in connection with the point I am on. The Solicitor-General said: "That proves a great deal too much, because you might have an area of land used in connection with the trade which had no possible connection with any building, and the difficulty, if difficulty it be, which counsel for the respondents raised, would arise with regard to that." That is I think a sufficient answer with regard to that argument. But I think that I ought to say this that I do not desire to go here into any question of double taxation which might arise in a suitable case. I am not satisfied that the course which, as I was informed, is taken of deducting the Schedule B assessment is not a correct and proper course, and one which may be justified on general principles. However that may be, having regard to a fact, which seems to me clearly to be a fact, that, as the Solicitor-General said, the argument of counsel for the respondents proved too much, I am not prepared on that ground to give effect to the view which he urged, because it seems to me that that view, if one carried it out fully, would involve this: that all land used for the purpose of the trade was entitled to come within the exemption. That cannot possibly be right-

Here, then, I think that the view of the law which the Commissioners appear to have taken was wrong. I think that they failed to observe that anything outside the four walls, if it were to come within the exemption, must be an adjunct to the building. I do not here propose to decide anything with regard to various cases which were suggested: a factory with a forecourt used for a loading, and things of that sort. It may well be that in cases of that sort the "building" would include something beyond the four walls. It would include the court necessary for the proper use of the building, and, therefore, in the strict sense, an adjunct to the building. My attention was called to several cases on different branches of the law which show that a construction of that sort may often properly be adopted, and nothing that I am saying here will preclude the construction being adopted in connection with the use of the word "building" here; that is to say, the construction that not merely the four walls, but things merely adjuncts to the four walls, things necessary for use in

connection with the building, may fall to be exempted as part of the building. But here I think one has only to look at the facts to see at once that the lawns and so forth cannot possibly be regarded as adjuncts of the building. I do not think that the Commissioners could have found that they were if they had not misdirected themselves in the manner which I have tried to indicate.

I arrive at the conclusion that on the facts here it is impossible to support the view of the Commissioners. I may put that in two ways, either of which is sufficient. In the first place, I think that the Commissioners, for reasons which I have tried to explain, did misdirect themselves in a point of law. In the second place, if they did not misdirect themselves in a point of law, if they correctly applied the law, then I think that they found that those things, the lawns and so forth, were buildings when there was no evidence which could justify such a finding. On these grounds I feel bound to differ from the view which was taken in the case by the Commissioners, and the result is that this appeal will be allowed with costs, and the case remitted to the Commissioners to fix the amount of the assessment.

Appeal allowed.

Solicitors—Solicitor of Inland Revenue, for the appellant; *Charles Russell & Co.*, for the respondents.

[In The House of Lords.]

ELLIOTT (INSPECTOR OF TAXES)

v.

J. H. AND F. H. BURN.

Lord Blanesburgh, Lord Warrington of Clyffe, Lord Atkin, Lord Thankerton, Lord Wright.

June 7, 8, 11; July 19, 1934.

Income Tax—Annual Value of Lands, Tenements and Hereditaments—"All Other Profits not before Enumerated" Arising From—Suface of Land Let at Rack Rent—Assessed under Schedule A, No. 1—Liberty Granted by Owner of Land to Owners of Minerals to Withdraw Support from the Land—Payment to Owner of Land of Annual Sum Under Agreement—Claim Annual

SUM CHARGEABLE UNDER SCHEDULE A—INCOME TAX ACT, XI OF 1918 (8 & 9 GEO. 5 c. 40), SCHEDULE A, No. II, RULE 7.

The respondents were the owners of the surface of land which they leased at a rack rent of £296. The minerals under the land were owned and worked by a colliery company. By an agreement dated December 21, 1922, the respondents in consideration of annual payments granted liberty to the colliery company to withdraw support from the land in working the minerals. The tenant of the surface was assessed on the rack rent to income tax under Schedule A of the Income Tax Act of 1918. The Attorney-General claimed that income-tax was payable under the words "in the case of all other profits not before enumerated...arising from lands, tenements, hereditaments...not being in the actual possession or occupation of the person to be charged" in Rule 7 of General Rule No. II to Schedule A by the respondents on the annual payments : Held, *that the annual payment, as it arose from the right of support which the respondents had to their land, was a payment incident to the land itself, and therefore arose from the ownership of the land itself, and would not fall within Rule 7 of No. II to Schedule A, but within No. I, and would be covered by the assessment on the annual value under No. I. It followed on the authority of* FRY v. SALISBURY HOUSE ESTATES [1930] (99 L. J. K. B. 403; [1930] A. C. 432; 15 Tax Cas. 266) *that the Crown's alternative claim under Schedule D also failed. It was agreed that Section 28 of the Finance Act, 1926, did not affect the question on this appeal.*

Decision of the COURT OF APPEAL [1934] (1 K. B. 109) *affirmed.*

Case referred to:

FRY v. SALISBURY HOUSE ESTATES [1930] (99 L. J. K. B. 403; [1930] A. C. 432; 15 Tax Cas. 266).

Appeal from an order of the Court of Appeal, allowing an appeal by the respondents from a decision of FINLAY, J., whereby an appeal by the Inspector of Taxes upon a case stated by the Commissioners for Income Tax Purposes was allowed and the decision of the Commissioners reversed.

The material facts are stated in the headnote and are fully set out in the judgment of LORD WARRINGTON of CLYFFE.

The Attorney-General (*Sir Thomas Inskip, K. C.*), and *R. P. Hills*, for the appellant.

Latter, K. C., and *J. Charlesworth*, for the respondents.

Their Lordships took time to consider their judgment.

July 19.—LORD WARRINGTON OF CLYFFE.—This is an appeal from an order of the Court of Appeal (LORD HANWORTH, M. R., LAWRENCE, L.J., and SLESSER, L.J.) dated July 7, 1933, allowing an appeal by the respondents from an order of the King's Bench Division (FINLAY, J.) dated January 31, 1933, whereby an appeal by the appellant upon a case stated by the Commissioners for the general purposes of the income tax for the Chester Ward in the county of Durham was allowed and the decision of the Commissioners was reversed.

The respondents are the owners of the surface of certain land at North Follingsby in the county of Durham. The minerals under the land are owned and worked by John Brown & Partners, Ltd., hereinafter called the colliery company. The surface of the land has at all material times been let by the respondents to a farming tenant at a rack rent of £ 296. On the basis of that rent as being under No. I of Schedule A the annual value of the lands the tenant as occupier has been assessed to tax under that Schedule.

The claim on the part of the Crown, which has been rejected by the General Commissioners and by the Court of Appeal, is in respect of certain annual payments payable under an agreement dated December 21, 1922, between the respondents, thereinafter called the lessors, of the one part, and the colliery company, thereinafter called the lessees, of the other part.

The agreement contained recitals to the effect that the lessors claimed that the lessees were not entitled to work any of the mines under the lands or adjacent thereto in such a manner as to let down the surface of the lands, and that the lessees were liable to pay damages to the lessors for injury already caused to the lands by the letting down of the surface, and it had been agreed that the lessors should grant to the lessees: "Liberty in working the said mines and seams of coal to let down such surface upon the terms hereinafter appearing." It was then witnessed that in pursuance of the said agreement, and in

consideration of the rent thereinafter reserved and of the covenants by the lessees thereinafter contained, the lessors thereby demised unto the lessees: "(5) Full liberty in working any mines or seams of coal which the lessees may for the time being be entitled to work under the said lands of the lessors at North Follingsby aforesaid (which lands are hereinafter referred to as 'the lands hereinbefore described') to withdraw from the said lands hereinbefore described or any part thereof any support for such lands whether vertical or lateral, but subject, as to such parts of the lands hereinbefore described or any other lands as may be affected thereby or subject thereto, to the provisions of the Railway Clauses Consolidation Act, 1845, and it is expressly declared that nothing in these presents shall be deemed to authorise the lessees to cause any damage or injury to any lands adjacent to any of the said lands hereinbefore described or any buildings, railways, works or erections on such adjacent lands whether belonging to the lessors or to any other person. (6) To hold the liberties granted unto the lessees from the 1st day of May, 1922, until the 30th day of October, 1948, provided the lease dated the 19th day of December, 1906, from the lessors to the lessees of surface liberties in connection with the lands hereinbefore described shall so long continue and subject and without prejudice to any rights of support to which any third party may now be entitled as the owner of any adjoining land. (7) Yielding and paying therefore the yearly certain rent of £150 or so in proportion for any less period than a year. (8) And also yielding and paying yearly the rent of 1½d. for every ton of coal worked by the lessees from underneath the said lands hereinbefore described." There then follow clauses as to short workings and as to the details of the payment of the several rents and other matters not relevant to the construction of the clauses quoted above.

The agreement then contains clause providing for the payment—Clause 14—to the lessors of their tenants of "full compensation for all damages which has already been caused or may hereafter be caused or arisen by or in consequence of any letting down of the surface of such lands to any drains, pipes, crops, stock, cattle or other things for the time being thereon by reason or in consequence of any past or future underground

operations of the lessees under the lands hereinbefore described or elsewhere whether the subsidences of such lands causing such damages arose previous to or after the commencement of any tenancy whether present or future of any of the said tenants." The rest of this clause need not be quoted for the present purpose.

Clause 15, however, is important; it is as follows: "On the expiration, or sooner, determination of the said term or within any time within three years thereafter, or, if so required by the lessors, at any time previous thereto to pay full compensation to the lessors for any injury which has already been caused or may hereafter be caused to any lands of the lessors by any past or future workings of the lessees whether under the lands hereinbefore demised or any adjoining lands." The word "demised" must, I think, be a misprint or a clerical error for "described." No lands were hereinbefore demised. By a further "lease" dated February 20, 1931, between the same parties, the term granted by the preceding instrument was extended to October 30, 1970.

I defer any remarks on the construction and effect of the instrument of December 21, 1922, until I have called attention to the material provisions of the Income Tax Act, 1918. The charge of income tax is effected by Section 1 of the Act: "Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains respectively described or comprised in the schedules marked A, B, C, D and E, contained in the First Schedule to this Act and in accordance with the Rules respectively applicable to those Schedules."

The only Schedule which deals with the charge in respect of "property," as distinct from "profits or gains," is Schedule A, and that Schedule begins with the statement that "Tax under Schedule A shall be charged in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, for every twenty shillings of the annual value thereof." The point is that in order that the tax may be charged you must find something falling within the description of "lands, tenements, hereditaments, and heritages" capable of being the property of some person.

There follows a series of general rules, under Nos. I, II and III, directed to the estimation of the annual value of particular descriptions of lands, tenements and hereditaments, and in the case of No. II for determining the person chargeable. No. I applies to all lands, tenements, hereditaments or heritages capable of actual occupation of whatever nature and for whatever purpose occupied or enjoyed, and of whatever value—except the properties mentioned in No. II and No. III of the Schedule. The annual value is to be understood to be the rack rent at which they are actually let, if there be one, or, if not let at a fixed rack rent, then the rack rent at which they are worth to be let by the year.

The main argument in this House on both sides was devoted to the question whether the case falls within Rule 7 of No. II under Schedule A, and I accordingly propose to state as shortly as I can the terms and the effects of No. II. I do not forget that by Section 28 of the Finance Act, 1926, it is provided that income tax in respect of the property in the lands, tenements, hereditaments or heritages to which the rules of No. II of Schedule A, and in those to which the rules of No. III of Schedule A apply, shall cease to be chargeable under Schedule A and shall become chargeable under Schedule D, but it is common ground that this transfer does not affect the questions in issue in this appeal, and I propose therefore to deal with the matter as if this change had not been made.

No. II is thus described: "Rules for estimating the annual value of certain lands, tenements, hereditaments or heritages which are not to be charged according to the preceding general rule, and for determining the person chargeable." There follows a series of rules enumerating the hereditaments to which this general rule is to apply. The first three rules relate: (1) to such hereditaments as tithes in kind; (2) payments in right of the Church or by endowment or in lieu of tithes and teinds in Scotland; and (3) tithes arising from lands if compounded for, and rents and other money payments in lieu of tithes arising from lands—except rent charges confirmed under the Tithe Act, 1836. By Rule 4 these are all to be assessed and charged on the person entitled to the tithes or payments, or his lessee or tenant, agent or factor. Rule 5 relates to manorial dues and casual profits.

These are to be charged on the lord of the manor or the person renting the same. Rule 6 deals with fines received in consideration of a demise of lands or tenements, and the tax is to be assessed and charged on the receiver of the fines, with a proviso protecting fines applied as productive capital. Putting aside Rule 6, which stands by itself, it is a common feature of all the subjects of taxation mentioned in these rules that they are all properly called hereditaments or heritages, but as such they are separate from the land itself from which they arise, and that land is not necessarily in the actual possession or occupation of the person to be charged.

I come now to Rule 7 itself. It is in the following terms: "In the case of all other profits not before enumerated (other than profits liable to deduction in pursuance of Rules 1 and 4 of No. VIII of this Schedule) arising from lands, tenements, hereditaments or heritages not being in the actual possession or occupation of the person to be charged, the annual value shall be understood to be the average amount for one year of the profits of the number of years which, on the statement of the person to be charged appears to the Commissioners to be fair and equitable. Tax shall be assessed and charged on the receiver of such profits or on the persons entitled thereto." Profits liable to deduction in pursuance of Rules 1 and 4 of No. VIII are rents payable to a landlord from which the tenant occupier may deduct the tax paid by him and annuities payable by an owner of land from which he may deduct the tax relating thereto. This exception throws no light on the construction of the rule.

The Crown contends that the "rents" payable under the "lease" of December, 1922, are profits comprised in Rule 7 of No. II of Schedule A. In my opinion, before the Crown can succeed, it must establish that such alleged profits arise from some hereditament, not being the lands themselves the subject of taxation under Schedule A, for these last-mentioned lands are in the actual possession and occupation either of the owner or of his tenants. In a sense they arise from the right of support, for it is the possession of this right which enabled the respondents to obtain the payments in question. But it is now thoroughly well settled, and it is unnecessary to refer to specific authorities in support of the proposition, that the right of the surface owner

to support of that surface by subjacent soil is not an easement, but is a natural incident to the land itself. If therefore the payments in question are to be regarded as arising from the right of support, they arise from the ownership of the land itself and would not come within No. II, Rule 7, but within No. I, and would be covered by the assessment on the annual value under No. I.

Then the Attorney-General insists that they should be treated as arising from the separate hereditament consisting of an easement alleged to be vested in the colliery company by virtue of the agreement of 1922, the alleged easement being a right to let down the surface in the working of their mines without interference on the part of the surface owners. The answer to this seems to me to be twofold. In the first place, in my opinion, on the true construction of the agreement no such right was in fact conferred upon the colliery company, and in the second place such a right, if conferred, would be a detriment to the owners of the surface, and I cannot see how sums of money received as the consideration for granting the right to inflict that detriment can be profits or gains arising to the owners of the surface from such right itself. The first answer, however, requires further consideration. I need not repeat the terms of the agreement, which are sufficiently set forth above. The agreement gives to the colliery company for a limited and uncertain period liberty, in working any subjacent coal which they were entitled to work, to withdraw from the lands of the respondents any support for such lands. This, I think, merely means that the respondents during the term will not seek either to recover damages for nuisance or an injunction restraining the colliery company from committing such a nuisance, but there is no actual surrender of the right of support itself. That this is so is, I think, made plain by the provisions of Clauses 34 and 15 as to compensation, for it is only on the assumption that the right of support continues to exist, though its immediate assertion may be controlled, that any claim to compensation could possibly arise.

On the whole, then, I am of opinion that the claim on the part of the Crown that the payments in question constitute profits arising from lands chargeable under Schedule A as being profits comprised in Rule 7 of No. II of Schedule A fails. In

strictness this in terms only applies to the payments prior to 1927-28, but the same result follows as to the subsequent payments, because it is common ground that the legal position is not altered by the transfer of the rule to Schedule D under the Act of 1926.

So far, if at all, as the payments represent a profit of the respondents, it comes to them in respect of their property in the lands themselves. Tax in respect of this property has been assessed on the annual value of the lands as ascertained under No. I, and this assessment covers the present claim. It follows, on the authority of *Fry* v. *Salisbury House Estates*, that the Crown's alternative claim under Schedule D also fails.

In my opinion the appeal should be dismissed with costs.

I am asked to say that my noble and learned friends LORD BLANESBURGH and LORD THANKERTON concur in this opinion.

LORD ATKIN.—I also agree.

LORD WRIGHT.—I also agree.

Appeal dismissed.

Solicitors—Solicitor of Inland Revenue, for the appellant, *Gregory, Rowcliffe & Co., Agents for Cooper & Jackson, Newcastle-on-Tyne*, for the respondents.

[IN THE HOUSE OF LORDS.]

VAN DEN BERGHS, LTD.

v.

CLARK (H. M. INSPECTOR OF TAXES).

Lord Atkin, Lord Tomlin, Lord Russell of Killowen, Lord Macmillan and Lord Wright.

April 8, 1935.

INCOME TAX AND SURTAX—COMPANY—TRADE PROFITS—INCOME OR CAPITAL EXPENDITURE—FIXED OR CIRCULATING CAPITAL—POOLING AGREEMENT BETWEEN COMPANIES TO ELIMINATE COMPETITION—SCHEME FOR SHARING PROFITS AND LOSSES—SUM PAID TO END AGREEMENTS—WHETHER INCOME RECEIPT OF COMPANY PAYING—INCOME TAX ACT, 1918 (8 & 9 GEO. 5 c. 40), SCHEDULE D.

A Dutch company and the appellants, who were competitors in the manufacture and dealing in margarine, in order to end the competition, entered into an agreement in 1908, by which they bound themselves to work in friendly alliance and to share their profits and losses in accordance with an elaborate scheme therein specified; further, that they would promote the commercial, pecuniary, buying and selling and other interests of the two companies. In 1913 another agreement was entered into modifying the original basis of ascertaining and sharing profits, and, subject thereto, continued in force the provisions of the agreement of 1908 until December, 1940. During the war the agreements were not operated, but in 1920 a third agreement was made modifying the two previous agreements as to the basis of profit-sharing, extending the branches of the business, and again continuing the principal agreement of 1908 till December, 1940. In 1927 three agreements were made, under which the appellants agreed to determine the agreements of 1908, 1913 and 1920 in consideration of the payments to them of £450,000. The Special Commissioners held that that sum was paid in respect of the pooling agreements, and must be brought in for the purposes of arriving at the balance of the profits of the appellants for the year ending December, 1927, and consequently that the sum was an income receipt. FINLAY, J., *held that the cancelled agreements were a capital asset of the appellants, and that the £450,000 was not an income receipt at all. The* COURT OF APPEAL *restored the decision of the Commissioners, who had held that the sum was not received by the appellants in consideration of the surrender of a fixed capital asset, but arose from a transaction attributable to circulating capital, and therefore an income receipt*:—

Held, *that the £450,000 was not an item of profit arising to the appellants from the carrying on of their trade, as the agreements which were cancelled were not ordinary commercial contracts made*

in the course of trading nor merely agreements as to how trading profits should be distributed, but affected the whole conduct of their business. Money laid out in the cancellation of so fundamental an organisation of a trader's activities could not be regarded as an income receipt or disbursement. Circulating capital was capital which was turned over, and in that process yielded profit or loss, and the appellants were not engaged in turning over the assets which the agreements in question constituted. The agreements formed the fixed framework within which their circulating capital operated, and were not incidental to the working of their profit-making machine. The principle laid down by Lord Cave in BRITISH INSULATED & HELSBY CABLES, LTD. *v.* ATHERTON [1925] (95 L. J. K. B. 336; [1926] A. C. 205; 10 Tax Cas. 155) *applied.*

Decision of the COURT OF APPEAL (151 L. T. 435) *reversed.*

Cases referred to:

ANGLO-PERSIAN OIL CO. *v.* DALE [1931] (100 L. J. K. B. 504; [1932] 1 K. B. 124).

BRITISH INSULATED & HELSBY CABLES, LTD. *v.* ATHERTON [1925] (95 L. J. K. B. 336; [1926] A. C. 205; 10 Tax Cas. 155).

GLENBOIG UNION FIRECLAY CO. *v.* INLAND REVENUE COMMISSIONERS ([1922] S. C. (H. L.) 112).

GLIKSTEN (J.) & SON *v.* GREEN [1929] (98 L. J. K. B. 363; [1929] A. C. 381).

INLAND REVENUE COMMISSIONERS *v.* NORTHFLEET COAL AND BALLAST CO. [1927] (12 Tax Cas. 1102).

MALLETT *v.* STAVELEY COAL AND IRON CO. [1928] (97 L. J. K. B. 475; [1928] 2 K. B. 405).

MITCHELL *v.* NOBLE, LTD. [1927] (96 L. J. K. B. 484; [1927] 1 K. B. 719; 1 Tax Cas. 372).

NEWCASTLE BREWERIES, LTD. *v.* INLAND REVENUE COMMISSIONERS [1927] (96 L. J. K. B. 735; 12 Tax Cas. 927).

SHORT BROTHERS, LTD. *v.* INLAND REVENUE COMMISSIONERS [1927] (136 L. T. 689; 12 Tax Cas. 955).

SMITH & SON *v.* MOORE [1921] (90 L. J. P. C. 149; [1921] 2 A. C. 13).

Appeal from a decision of the Court of Appeal.

The main facts are stated in the headnote and are fully stated in the judgment of LORD MACMILLAN.

Sir William Jowitt, K. C., Latter, K. C., and *Cyril King,* for the appellants.

The Attorney-General (Sir Thomas Inskip, K. C.), and *R. P. Hills,* for the respondent.

The arguments, which were heard on March 4, 5 and 7 appear from the judgment of LORD MACMILLAN.

Their Lordships took time to consider their judgment.

April 8.—LORD ATKIN.—I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend, LORD MACMILLAN. I agree with it and have nothing to add.

LORD TOMLIN.—I also have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend, LORD MACMILLAN—and I concur in it in all respects and have nothing to add.

LORD MACMILLAN.—In the year 1927 the appellants received payment of a sum of £ 450,000 from Anton Jurgens Vereenigde Fabricken of Holland (whom I shall call "the Dutch Company") pursuant to the terms of an agreement between the appellants and the Dutch Company dated September 24, 1927. The question is whether this sum ought to be taken into account in computing the balance of the profits or gains of the appellants' trade for the year 1927 on which they are chargeable to tax for the year 1928-29 under Schedule D of the Income Tax Act, 1918.

The appellants say that the £ 450,000 was a capital receipt and ought not to be reckoned as forming any part of the profits arising from the carrying on of their trade. The Crown says that the £ 450,000 was a trade receipt which ought to be included in the computation of the appellants' profits or gains for income-tax purposes.

The circumstances in which the appellants received the payment which has now to be examined are set out in the Stated Case, from which I select the salient facts. The appellants were incorporated as a limited company in this country in 1895 and have since carried on the business of manufacturing and dealing in margarine and similar products on a very extensive scale both here and abroad. They had as their keenest competitors the Dutch Company, which was engaged in the same business in Holland. On February 13, 1908, the two companies entered into an agreement whereby they bound themselves for the future to "work in friendly alliance" and to share their profits and losses in conformity with an elaborate scheme detailed in the agreement. Each of the two companies had a controlling interest in a number of other companies and they undertook that, if either of them or any of the companies which they controlled should acquire an interest in any other margarine concern, the fact should be communicated to the other party, who should have an option to require such interest to be brought within the operation of the agreement. Both companies further undertook on behalf of themselves and of their controlled companies not to enter into any pooling or price arrangements with third parties which might be deemed inimical to the interests of the two companies under the agreement. The directors and managers of the respective companies were parties to the agreement and bound themselves for twenty years not to engage in any

margarine business other than that of the two companies. Provision was also made for the setting up of a representative joint committee which was empowered to make arrangements with outside companies and firms as to the selling and buying prices of margarine and the limitation of areas of supply. It was further comprehensively agreed that "each of the two companies shall be true and loyal to the other of them and shall do all in the power of such company to promote the commercial, technical, pecuniary, buying and selling and other interests of the parties hereto in relation to the margarine business." It is not necessary to set out the detailed provisions of the agreement, but its elaborate character is sufficiently indicated by the fact that it consists of thirty-five articles (with numerous sub-heads) and five schedules and extends to twenty-two pages of print in the case before your Lordships.

A supplemental agreement was entered into between the parties on July 17, 1913, which recited that the Dutch Co. had acquired rights in a process for hardening oils and that the parties were desirous of formulating a scheme for the merger of their assets or the unification of their financial and commercial interests and for the regulation and allocation of their turnover, but that such a scheme could not at present be fully elaborated to their satisfaction, and it was desirable in the meantime to regulate their mutual relations and modify and extend the principal agreement in the manner provided in the supplemental agreement. By this second agreement the parties modified the original basis of ascertaining and sharing profits and subject thereto agreed to continue in force the relative provisions of the principal agreement until December 31, 1940. Provision was made for the formation of a committee to endavour to devise the scheme of merger or unification mentioned in the recital, and, failing agreement upon such a scheme by December 15, 1913, the parties bound themselves to execute a contract confirming and extending to December 31, 1940, the provisions of the supplemental agreement and of a scheduled document setting out agreed alterations in their existing pool contract.

According to the Stated Case "each company carried on its business independently, but in general the parties observed the terms of the said agreements for each of the years 1908 to 1913 and the profits of the two companies were accounted for for those years. Payments were in fact made by and to the appellants under the said agreements in these years. Such payments when made to the Dutch Co. were deducted as an expense and when made by the Dutch Co. were brought in as a receipt in making up the appellants' profit and loss accounts for the years in which the payments were made or received. In computing the appellants' income tax liability for the said years the amount of such payments or receipts were deducted or brought into the taxable profit deductively and the income tax paid accordingly. It was also

agreed by the appellants when liability for income-tax and excess profits duty was under consideration for years subsequent to 1915 that the results of working the said agreements should be charged to income tax and excess profits duty as trading receipts and payments."

During the war the two companies did not operate the agreements, and after peace was restored they found it desirable to enter into a fresh agreement in an endeavour to render workable the two previous agreements which were then running and would not terminate till 1940. This third agreement, which was dated October 15, 1920, recited that some of the provisions of the previous agreements had become obsolete or impracticable. It then proceeded to provide that, subject to the amendments and addition thereby effected, the principal agreements should remain in force till December 31, 1940. Further provision was made for the mutual communication of information relating to manufacturing processes, the basis of the ascertainment and division of profits was modified, the branches of business embraced were extended and various other matters were regulated. As in the case of the two previous agreements, all disputes were referred to arbitration.

Meantime the appellants had been endeavouring to estimate the sum which they believed had accrued due to them by the Dutch Co. over the war period. After various tentative calculations they brought out in 1922 a sum of £449,042, which they alleged was owing to them. The Dutch Co. disputed this figure and claimed that on the contrary the appellants were on balance indebted to them. The matter went to arbitration in 1925. The proceedings dragged on inconclusively at "prodigious" expense until, in 1927, the parties came to an arrangement which was embodied in three agreements, all dated September 24, 1927.

By the the first of these agreements the members of the Jurgens family and the members of the Van den Bergh family agreed to consolidate their respective interests in a Dutch holding company and an English holding company on the terms therein mentioned. By the second of these agreements each party withdrew all claims against the other party under the agreements of 1908, 1913 and 1920 for the years 1914 to 1927 inclusive, and both parties mutually discharged each other from any liability arising thereunder before December 31, 1927. Each party further undertook to do everything necessary to put an end to the arbitration. The third of these agreements recited that the Dutch Co. had expressed to the appellants a desire to determine the agreements of 1908, 1913 and 1920, contrary to the provisions therein contained and that the appellants had consented thereto in consideration of the payment to them by the Dutch Co. of £450,000 "as damages". The agreement consists of two articles only. By the first article the parties agreed that the three agreements of 1908, 1913 and 1920 should be thereby determined as from

December 31, 1927, and each party released the other party from all claims thereunder. By the second article the Dutch Co. undertook forthwith to pay to the appellants a sum of £100,000 and to hand to them promissory notes for a further sum of £350,000 payable as therein stated. In point of fact the total sum of £450,000 was paid in cash by the Dutch Co. to the appellants before the expiry of the year 1927. This is the sum in dispute in the present appeal.

The Special Commissioners held that "the £450,000 was paid in respect of the pooling agreements and must be brought in for the purpose of arriving at the balance of profits and gains of the appellants for the year ending December 31, 1927." That is their sole finding; it is not informative, for everyone agrees that the sum in question was paid "in respect of the pooling agreements," but there can be no doubt, if regard be had to the contentions submitted to them, that the Commissioners' view was that the sum in question was an income receipt.

Finlay, J., reversed the determination of the Special Commissioners, and held that the agreements which were cancelled were "a capital asset" of the appellants and that the £450,000 was "not an income receipt at all." The Court of Appeal unanimously reversed this judgment and restored the determination of the Special Commissioners, holding that the sum was not received by the appellants in consideration of the surrender of a fixed capital asset, but arose from a transaction attributable to circulating capital, and was consequently an income receipt.

The problem of discriminating between an income receipt and a capital receipt and between an income disbursement and a capital disbursement is one which in recent years has frequently engaged your Lordships' attention. In general the distinction is well recognised and easily applied, but from time to time cases arise where the item lies on the borderline and the task of assigning it to income or to capital becomes one of much refinement, as the decisions show. The Income Tax Acts nowhere define "income" any more than they define "capital"; they describe sources of income and prescribe methods of computing income, but what constitutes income they discreetly refrain from saying. Nor do they define "profits or gains"; while as for "trade", the "interpretation" section of the 1918 Act only informs us, with a fine disregard of logic, that it "includes every trade, manufacture, adventure or concern in the nature of trade". Consequently it is to the decided cases that one must go in search of light. While each case is found to turn upon its own facts, and no infallible criterion emerges, nevertheless the decisions are useful as illustrations and as affording indications of the kind of considerations which may relevantly be borne in mind in approaching the problem.

The reported cases fall into two categories, those in which the subject is found claiming that an item of receipt ought not to be

included in computing his profits and those in which the subject is found claiming that an item of disbursement ought to be included among the admissible deductions in computing his profits. In the former case the Crown is found maintaining that the item is an item of income; in the latter that it is a capital asset. Consequently the argumentative position alternates according as it is an item of receipt or an item of disbursement that is in question, and the taxpayer and the Crown are found alternately arguing for the restriction or the expansion of the conception of income.

I propose to refer first to the case of *British Insulated and Helsby Cables, Ltd.* v. *Atherton.* This case has been generally recognised as the leading modern authority on the subject, though I fear that ROMER, L.J., was unduly optimistic when he said that it "placed beyond the realms of controversy" the law applicable to the matter—*Anglo-Persian Oil Co.* v. *Dale* (100 L. J. K. B., at p. 511; [1932] 1 K.B., at p. 145). The facts were that the appellant company claimed to deduct in the computation of its trade profits a sum which it had provided to form the nucleus of a pension fund for its employees. The Crown argued that the sum ought to be debited to capital, on the ground that it "was not in its nature recurrent but was made once and for all", and that it was a case of the "provision of a captial sum which will for ever after relieve the company from making any further payment whatsoever". This argument prevailed. The Lord Chancellor (Viscount Cave) found in the decisions "considerable authority" for the view which he recommended to the House to adopt, namely, that (95 L.J.K.B., at p. 340; [1926] A.C., at pp. 213, 214) "when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade.........there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital." LORD ATKINSON (95 L.J.K.B., at p. 344; [1926] A.C., at p. 222) indicated that the word "asset" ought not to be confined to "something material"; and in further elucidation of the principle, ROMER, L. J., has added that the advantage paid for need not be "of a positive character and may consist in the getting rid of an item of fixed capital that is of an onerous character"—*Anglo-Persian Oil Co.* v. *Dale* (100 L. J. K. B., at p. 511; [1932] 1 K.B., at p. 146).

If the numerous decisions are examined and classified they will be found to exhibit a satisfactory measure of consistency with LORD CAVE's principle of discrimination. Certain of them relate to excess profits duty and not to income tax, but for the present purpose this distinction is immaterial. A sum provided to establish a pension fund for employees, as has already been seen, is a capital disbursement—*British Insulated & Helsby Cables, Ltd.* v. *Atherton*; so is a sum paid by a coal merchant for the acquisition of the right to a number of current contracts to supply

coal—*Smith & Son* v. *Moore*; so is a payment by a colliery company as the price of being allowed to surrender unprofitable seams included in its leasehold—*Mallett* v. *Staveley Coal and Iron Co.* Similarly, a sum received by a fireclay company as compensation for leaving unworked the fireclay under a railway was held to be a capital receipt—*Glenboig Union Fireclay Co.* v. *Inland Revenue Commissioners*.

On the other hand, a sum awarded by the War Compensation Court to a company carrying on the business of brewers and wine and spirit merchants in respect of the compulsory taking over of its stock of rum by the Admiralty was held to be a trade or income receipt (*Newcastle Breweries, Ltd.* v. *Inland Revenue Commissioners*) so was a sum paid to a shipbuilding company for the cancellation of a contract to build a ship (*Short Brothers, Ltd.* v. *Inland Revenue Commissioners*); so was a lump sum payment received by a quarry company in lieu of four annual payments in consideration of which the company had relieved a customer of his contract to purchase a quantity of chalk yearly for ten years and build a wharf at which it could be loaded (*Inland Revenue Commissioners* v. *Northfleet Coal and Ballast Co.*); so was a sum recovered from insurers by a timber company in respect of the destruction by fire of their stock of timber (*J. Gilksten & Son* v. *Green*). Conversely, where a company paid a sum as the price of getting rid of a life director, whose presence on the board was regarded as detrimental to the profitable conduct of the company's business, the payment was held to be an income disbursement (*Mitchell* v. *Noble Ltd.*); so was the payment made in the case of the *Anglo-Persian Oil Co.* v. *Dale* in order to disembarrass the company of an onerous agency agreement. There are further instances in the reports, but I have quoted enough for the purposes of illustration.

With the guidance thus afforded I now address myself to the question whether the £ 450,000 received by the appellants in the circumstances already narrated can properly be described as an item of profit arising or accruing to them from the carrying on of their trade, which ought to be credited as an income receipt. It is important to bear in mind at the outset that the trade of the appellants is to manufacture and deal in margarine, for the nature of a receipt may vary according to the nature of the trade in connection with which it arises. The price of the sale of a factory is ordinarily a capital receipt, but it may be an income receipt in the case of a person whose business it is to buy and sell factories.

The learned Attorney-General stated that he was content to take the agreements of 1927 as meaning what they say. The sum of £ 450,000 is accordingly to be taken as having been paid by the Dutch Co., to the appellants in consideration of the appellants consenting to the agreements of 1908, 1913 and 1920 being terminated as at December 31, 1927, instead of running their

course to December 31, 1940. If the payment had been in respect of a balance of profits due to the appellants by the Dutch Co. for the years 1914 to 1927, different considerations might have applied, but it is agreed that it is not to be so regarded.

What were the appellants giving up? They gave up their whole rights under the agreements for thirteen years ahead. These agreements are called in the Stated Case "pooling agreements", but that is a very inadequate description of them, for they did much more than merely embody a system of pooling and sharing profits. If the appellants were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years, the lump sum might be regarded as of the same nature as the ingredients of which it was composed. But even if a payment is measured by annual receipts, it is not necessarily itself an item of income. As LORD BUCKMASTER pointed out ([1922] S. C. (H.L.), at p. 115), in the case of *Glenboig Union Fireclay Co.* v. *Inland Revenue Commissioners*: "There is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the test."

The three agreements which the appellants consented to cancel were not ordinary commercial contracts made in the course of carrying on their trade; they were not contracts for the disposal of their products, or for the engagement of agents or other employees necessary for the conduct of their business; nor were they merely agreements as to how their trading profits when earned should be distributed as between the contracting parties. On the contrary, the cancelled agreements related to the whole structure of the appellant's profit-making apparatus. They regulated the appellants' activities, defined what they might and what they might not do, and affected the whole conduct of their business. I have difficulty in seeing how money laid out to secure, or money received for the cancellation of, so fundamental an organisation of a trader's activities can be regarded as an income disbursement or an income receipt. Counsel for the Crown very properly warned your Lordships against being misled as to the legal character of the payment by its magnitude, for magnitude is a relative term, and we are dealing with companies which think in millions. But the magnitude of a transaction is not an entirely irrelevant consideration. The legal distinction between a repair and a renewal may be influenced by the expense involved. In the present case, however, it is not the largeness of the sum that is important but the nature of the asset that was surrendered. In my opinion, that asset, the congeries of rights which the appellants enjoyed under the agreements and which for a price they surrendered, was a capital asset.

I have not overlooked the criterion afforded by the economists' differentiation between fixed and circulating capital which LORD HALDANE invoked in *Smith & Son* v. *Moore* and on which the

Court of Appeal relied in the present case, but I confess that I have not found it very helpful. Circulating capital is capital which is turned over and in the process of being turned over yields profit or loss. Fixed capital is not involved directly in that process, and remains unaffected by it. If this is to be the test, I fail to see how the appellants could be said to have been engaged in turning over the asset which the agreements in question constituted. The agreements formed the fixed framework within which their circulating capital operated; they were not incidental to the working of their profit-making machine but were essential parts of the mechanism itself. They provided the means of making profits, but they themselves did not yield profits. The profits of the appellants arose from manufacturing and dealing in margarine.

For these reasons I am of opinion that the judgment of the Court of Appeal should be reversed with costs and the judgment of FINLAY, J., restored.

LORD WRIGHT.—I am in full agreement with the opinion which has just been delivered by LORD MACMILLAN, and I have nothing to add.

LORD ATKIN.—I am asked by my noble and learned friend, LORD RUSSELL OF KILLOWEN, to say that he has read the opinion which has just been delivered and that he agrees with it.

Appeal allowed.

Solicitors.—Gouldin, Mesquita & Co., for the appellants; *Solicitor of Inland Revenue*, for the respondent, *Inspector of Taxes*.

[IN THE HOUSE OF LORDS.]

BIRMINGHAM CORPORATION v. BARNES (INSPECTOR OF TAXES).

Lord Atkin, Lord Tomlin, Lord Russell of Killowen,

Lord Macmillan, and Lord Wright.

March 8, 1935.

INCOME TAX AND SURTAX—TRAMWAYS—MACHINERY OR PLANT USED FOR PURPOSES OF TRADE—VALUE DIMINISHED BY WEAR AND TEAR—ALLOWANCE BY WAY OF DEDUCTION—AGGREGATE DEDUCTIONS EXCEEDING ACTUAL COST TO TRADER—MEANING OF "ACTUAL COST"—INCOME TAX ACT, 1918 (8 & 9 GEO. 5 c. 40), SCHEDULE D, RULES APPLICABLE TO CASES I AND II, RULE 6 (1) (6).

In charging the profits or gains of a taxpayer who carries on a trade falling under Schedule D of the Income Tax Act, 1918, the Commissioners of Income Tax may make such deduction as they may " consider just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purpose of the trade and belonging to the persons by whom it is carried on ", but no deduction for wear and tear may be allowed " if the deduction, when added to the deductions allowed on that account for any previous years to the person by whom the trade is carried on, will make the aggregate amount of the deductions exceed the actual cost to that person of the machinery or plant, including in that actual cost any expense in the nature of capital expenditure on the machinery or plant by way of renewal, improvement or reinstatement."

A taxpayer had received contributions towards the cost of a tramway constructed by him from a company carrying on business in the neighbourhood of the tramway and from the Government unemployment grants committee:—Held that, *for the purpose of determining the actual cost of the tramway to the taxpayer, the sum so received need not be subtracted from the total amount paid for its construction.*

Decision of the majority of the COURT OF APPEAL (103 L. J. K. B. 338; [1934] 1 K. B. 484) *reversed.*

Case referred to:

HALL, JUNIOR & Co. *v.* RICKMAN [1905] (75 L. J. K. B. 178; [1906] 1 K. B. 311).

Appeal from the Court of Appeal.

The facts are stated in the judgment of Lord Atkin.

Latter, K. C., Wilfrid Greene, K.C., and *G. R. Blanco White,* for the appellant.

The Attorney-General (*Sir Thomas Inskip, K. C.*), and *R. P. Hills,* for the respondent.

The House took time to consider its judgment.

March 8.—LORD ATKIN.—The question in this case arises on the construction of a few words in one of the rules relating to the computation of income tax under Schedule D. It has evoked so far an equal division of judicial opinion, and no one therefore would be inclined to express his opinion as not admitting a doubt; but I have come to a conclusion which leads me to invite your Lordships to allow the appeal. The facts can be shortly stated. In 1920 the Birmingham Corporation laid a new tramway track between Salford Bridge, Erdington, and the works of the Dunlop Rubber Co. They laid the track by direct employment of labour and it cost for labour and materials £ 54,732. By agreement in

writing between the Dunlop Co. and the corporation dated April 19, 1920, the corporation agreed to construct the tramway; and the company agreed that if the corporation had completed the tramway and commenced a reasonable service on or before June 1, 1920, the company would pay the corporation £ 10,000, and a further sum of £ 50 a day for each day saved before June 1. Five thousand pounds was paid on March 30, while the work was in progress; the balance, including £ 806 further dispatch money, was paid after the work was completed. There was no stipulation as to any express use to which the £ 10,000 was to be put, and so far as I can see the corporation were free to use it as they pleased. In fact, as was natural, they treated it as a receipt of the tramway undertaking, and their amount of expenditure on permanent way in the year 1920 shows a sum of £ 43,945 as being the total sum expended, being the actual sum less the payment made by the Dunlop & Co.

In 1921 the corporation embarked on the reconstruction of certain tramway tracks, upon which they expended £ 271,399. In December, 1920, the unemployment grants committee had intimated that the Government had decided to provide a grant of £ 3,000,000 to assist local authorities to carry out works at which unemployed men could be engaged. The corporation applied for a grant in respect of the work on the tramway tracks just mentioned. The work began on February 8, 1921; the application was made on February 10. On February 21, 1921, the unemployment grants committee intimated that they were prepared to make a grant of £ 30,000 on certain conditions mentioned. From time to time further grants were applied for and were acceded to. Applications for payment of the promised grant were made on the appropriate forms, the substance of the matter being that the corporation certified that the stipulated number of unemployed men had been employed and that wages had been paid up to or in excess of the amount of the promised grant. Payments were made by the committee on these applications in respect of these tramway tracks to the amount of £ 46,238, thus reducing the amount actually borne by the corporation to £ 225,161.

The question that arises on these figures is as to the amount which the corporation is entitled to claim as an allowance for wear and tear in respect of these tramway tracks under Rule 6 of the rules of Cases I and II of the Income Tax Act, 1918. I will not read the rules but will promise that it is common ground that the corporation were entitled to an allowance for these tracks on the footing that they were new tracks. The allowance is claimed in computing the profits of the corporation in respect of their tramway undertaking.

In pursuance of Rule 6 (1) an allowance has been made to the corporation year by year in accordance with a scheme adopted by the Board of Revenue in 1922 by agreement with representatives of the various local authorities possessing tramway undertakings.

By this scheme allowances were granted " on the basis of the sum actually expended and of the agreed life ", with a proviso that the allowances were to continue until the " full cost " had been allowed. The latter proviso was no doubt intended to give effect to sub-Rule 6 of Rule 6. It is not contended that this agreement can alter the true meaning of the rules; but it serves to illustrate the possible use of words the true construction of which has to be sought in the section. The life of the tramways under the agreement was computed at twelve years and each year the corporation received an allowance of £ 4,563, or one twelfth of £ 54,732, in the case of the first tramway, and of £ 22,617, one twelfth of £ 271,339, in the case of the second tramway. Apparently a question had arisen in 1926 before the Commissioners as to the amount upon which an allowance should be made in the case of another local authority which had also received a grant. The Commissioners then decided that the grant must be based upon the total expenditure, leaving the question as to the limit of the aggregate to be determined when that question arose under sub-Rule 6.

In the present case it arose in the case of the first tramway for the year 1930-31; in the case of the second tramway for the year 1931-32. The Inspector of Taxes claimed that " the actual cost to the corporation " must be measured by deducting from the total expenditure in the first case the amount paid to the corporation by the Dunlop Co., in the second case the amount of the Government grant. Added to the previous allowances the full allowances would make up for the years in question an aggregate in excess of the " actual cost " so ascertained. The question now is whether this meaning of " actual cost to the person " is correct. In my opinion the words " the actual cost to the person by whom the trade is carried on " used in this context have no relation to the source from which that person has received the money which he has expended on the plant. One is assisted in the construction by the history of the legislation. In 1876 for the first time statutory authority was given for making an allowance to persons carrying on a trade in respect of diminution in value of their plant by reason of wear and tear. It was a deduction from profits which businessmen ordinarily make with a view of making good an essential capital asset which sooner or later will have to be replaced. As it was given, in terms corresponding to sub-Rules 1 and 2, had obviously nothing to do with the question how or with what funds the businessman acquired the plant. In any case he would make a deduction from profits; and the deduction would be based on the value of the plant and its expected life. In the year 1906, however, there arose a case before WALTON, J., of *Hall, Junior & Co.* v. *Rickman*, in which a shipowner claimed depreciation allowance in respect of a ship which, being used as a hulk, was held to be plant. The allowances had continued so long in respect of this ship that if granted for the tax year in question they would have exceeded 100 per cent. of the cost of the ship to the shipowner. The Inland Revenue authorities objected, but the

Judge, though thinking the objection reasonable, could find in the Income Tax Acts no restriction on the aggregate of the allowances to be granted. He pointed out, as is conceded, that if the plant were sold the allowances would begin again on the value of the plant to the new owner. After this decision, and undoubtedly in consequence of it, there was pased in 1907 a section in the terms of the present sub-Rule 6. I entirely agree with the submission of the Attorney-General that you must not restrict the plain words of a remedial section so as to apply them only to the mischief which occasion the enactment. But you may look at the mischief as one of the elements assisting you to construe the words of the remedy. You may also look at the use of the same words in relation to the same subject-matter in the same enactment.

The words "actual" itself gives me no assistance. It serves, as counsel suggested, to give emphasis to the word following. It is to be the cost, the whole cost, and nothing but the cost. It removes any question of estimate, and in cases where the plant has been purchased for a lump sum together with factory premises it may give rise to a difficult question of fact. The word "actual" is used in the same emphatic sense in Rule 3 in respect of actual wager, actual expenditure and actual loss. I do not read actual cost to mean anything more than cost accurately ascertained.

Bnt it is said that the words "to the person" in the phrase "actual cost to the person" plainly indicate that the section is intending to confine the relief to an aggregate equal to the sum of money which the person has defrayed out of his own resources, cost of which the burden has ultimately fallen upon him. I confess I do not think that this is the natural meaning of the words. What a man pays for construction or for the purchase of the work seems to me to be the cost to him; and that whether someone has given him the money to construct or purchase for himself; or before the event has promised to give him the money after he has paid for the work; or after the event has promised or given the money which recoups him what he has spent. In the present case the corporation paid the whole of the cost of the tramways out of their funds unless the first half of the Dunlop contribution was so applied: as to which there is no evidence; nor is it material. I myself should not have thought the answer of counsel for the appellants to the question put by ROMER, L. J., would have been what he suggests. On the hypothesis that the Dunlop Co. had recouped the corporation the whole of the cost of the first tramway, I should have thought the answer to "what did it cost you?" or "what did it actually cost you?" would have been "it actually cost us £ 54,732, but none of the burden of that cost will fall on the corporation for the Dunlop Co. have paid us the full amount". I think the same result is arrived at by saying actual cost to the person is the same thing as the amount expended by the person. One is assisted in this construction by consideration of the words at the end of sub-Section 6, which, as pointed out by counsel for the appellants, include in that actual cost any expenditure in the nature of capital

expenditure. Here there are no qualifying words, and I think the phrase guides one to the conclusion that expenditure on capital improvements by the person regardless of source will be the same as actual cost to the person also regardless of source. No doubt you must give the whole phrase its full meaning. But I find the reference "to the person" fully satisfied when I remember that, as pointed out by WALTON, J., in the case that gave rise to the new limitation, the person claiming a reduction may vary from time to time, and that with each successive purchaser you are to begin again. The words also serve to make it clear that the cost is the cost to the person carrying on the business and will include a profit paid by him to a contractor if one has been employed.

I do not think that it is necessary for the purpose of this case to discuss the question which may arise where the person carrying on the business has acquired the plant by gift, a question that will arise probably, if at all, in respect of a gift under a will. Various problems arise involving, amongst others, the possible contention that where there has been no cost there is no measure, no yard-stick, by which to restrict at all the allowance granted by sub-rule 1. I prefer, therefore, to say nothing on this topic. I find myself in the result in agreement with the Master of the Rolls and FINLAY, J., and I move your Lordships that this appeal be allowed and the order of FINLAY, J., restored, and that the appellants have the costs here and in the Court of Appeal.

The other noble and learned Lords concurred.

Appeal allowed.

Solicitors.—Sharpe, Pritcharn & Co., agents for *F. H. C. Witshire, Town Clerk, Birmingham*, for the appellants; *Solicitor of Inland Revenue*, for respondent.

GENERAL INDEX
TO
INCOME TAX REPORTS
Vol. III, 1935.

Annuities

Appeals

Associations

Attachment

Bad Debts

END OF VOL. III.